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Vol. III

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]32

LIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 5, 1924.

CERTIORARI AND RETURN FILED JULY 31, 1924.

(28,613)

(28,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME III.

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1 VOL. 3.

In the District Court of the United States for the Eastern District of Pennsylvania, December Term, 1914.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Answer.

Filed January 29, 1915.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The answer of William R. Warner & Company, a corporation, to the bill of complaint in the above entitled case showeth as follows:

1. The averments of paragraph 1 are admitted, except the averment that "Coco-Quinine" is a compound of high medicinal value. It has the medicinal value of quinine, the chocolate merely acting as a vehicle, used to make the quinine more palatable.

2 2. Defendant has no exact knowledge as to when the plaintiff began the manufacture and sale of "Coco-Quinine." It denies that at the time when the plaintiff became such manufacturer, no similar product was known either to the drug trade or to the medical profession, but avers that at that time there were on the market preparations intended to be used as vehicles for administering quinine and disguising its bitter taste. It has no knowledge as to whether the product was the result of long study and expensive experiment. It denies that the said compound became widely and favorably known as a remedy except in the sense that it was a product which enabled the administration of quinine in a more palatable form.

3. It is denied that the plaintiff, for the purpose of identifying its product, made the compound of a special color commonly called chocolate. The defendant avers that the plaintiff's compound merely has substantially the natural color of chocolate, of which it is in part compounded.

4. The defendant denies that the plaintiff, as a means of identifying the origin of the said product, adopted a certain arbitrary selected flavor, to wit, chocolate. The defendant has no knowledge or in-

formation of any other syrups of other flavors that might be used for the same purpose as is averred in paragraph 4, and therefore denies that any such exist or are known, and avers that chocolate, while-non-essential to the medicinal characteristics of the product, is essential to certain vital characteristics thereof.

5. The defendant admits that such product of the plaintiff has become known as "Coco-Quinine," but denies that has become so known by its color or flavor or by its medicinal effects, or in any other way than as a palatable preparation of quinine. The defendant admits that the name of the plaintiff's product has been recog-
3 nized, but denies that its color and flavor were and are recognized and freely acquiesced in by the trade.

Defendant further avers that compounds of quinine and chocolate, similar to plaintiff's, were manufactured and sold on the market by various drug manufacturers prior to the time when Searle & Hereth Company began to manufacture and sell "Quin-Coco."

6. The defendant admits the averments of paragraph 6, but avers that the sale of compounds of quinine and chocolate to consumers are almost universally made in doses, usually by druggists on physician's prescriptions.

7. The averments of paragraph 7 are admitted, except that it is averred that the plaintiff's product has no other reputation than as quinine in a palatable form and that its remedial action depends solely on the quinine contents.

8. The defendant admits that it is a corporation under the laws of Pennsylvania, and a citizen of said state; that its principal place of business is in Philadelphia, and that it is engaged in the manufacture and sale of medicinal products, and distributes the products of other concerns, including Searle & Hereth Company and Pfeiffer Chemical Company. It is admitted that about the year 1906 the Searle & Hereth Company began the manufacture and sale of a compound of quinine and chocolate. It is denied that it did so with any wrongful or fraudulent intent to divert and appropriate to its own use and own profit a part of the plaintiff's business in the sale of Coco-Quinine or with any other wrongful or fraudulent intent whatever. It is denied that it made its said product in exact imitation of the plaintiff's product. It is denied that it manufactured the same with the purpose and intent of selling it for a substitute for
4 the plaintiff's product and enabling druggists and others to substitute it for the plaintiff's product when Coco-Quinine was called for by customers and indicated on physicians' prescriptions. It is admitted that the defendant's product is of the same color and appearance substantially and of similar flavor as plaintiff's product, but it is averred that the color and appearance of plaintiff's product are due entirely to the chocolate ingredient, but that the flavor of defendant's product is not due to chocolate syrup alone, as is claimed for plaintiff's product, but is due to a combination of chocolate, vannalin and a special extract of yerba santa.

The defendant admits that the name "Quin-Coco" was adopted, but denies that the name and label used by the defendant are a close imitation or any imitation of the plaintiff's name and label, and that they are easily confused therewith. It denies that the defendant's product is a substantially exact imitation of and substitute for plaintiff's product and that it is so recognized in the trade. It avers that the label used on defendant's preparation is easily distinguishable from the plaintiff's label. It denies that Searle & Hereth Company offers the said product to plaintiff's customers, druggists and dealers, informing them that it could and can be used as a substitute for the plaintiff's product. It denies that druggists had any instructions as to any wrongful sale of defendant's product. It denies that defendant's product has been sold to the trade on such representations (at least by the knowledge, authority or permission of the defendant) and that it has been sold by druggists, upon any instructions from defendant to supply demands from customers for plaintiff's product, by authority, or to the knowledge of defendant.

9. It is denied that the defendant has ever made renewed efforts or any efforts to push its product in the drug trade and medical profession as a substitute for the plaintiff's product, except in the way of fair and lawful business competition. It is denied that the Searle & Hereth Company is merged into the business of the Pfeiffer Chemical Company. It is admitted that the same individuals subsequently became interested in all three of the companies mentioned in paragraph 9, and that the defendant is the distributor of "Quin-Coco." It is denied that the defendant has by many and divers ways and schemes or otherwise, in placing its said product on the market represented, through its agents and salesmen to purchasing druggists and physicians that its said product could be furnished in lieu of plaintiff's product when called for by customers or by physicians' prescriptions. There was no connection between defendant and Searle & Hereth Company until late in the year 1908.

It is denied that druggists have, as averred in this paragraph, received any instructions from defendant as to selling "Quin-Coco" for "Coco-Quinine." The defendant is without knowledge or information that druggists ave sold and are now selling "Quin-Coco" for "Coco-Quinine"; but it avers that if any druggist has done so it has been without the instruction, suggestion or knowledge of the defendant.

The defendant has no knowledge or information that customers frequently receive "Quin-Coco" with the druggists' own label, but bearing the name of "Coco-Quinine," but avers that if such has ever been the case, it has been without the knowledge, instruction, representation or suggestion of the defendant, and has been done by such druggists' own unaided volition. The defendation denies that any act on its part has ever unlawfully or wrongfully deprived or is now depriving the plaintiff of sales of its said product, or has resulted in deceiving or defrauding purchasers and users who intend to buy "Coco-Quinine." The defendant denies that it has by any

unlawful or wrongful method whatever pushed the sale and
6 distribution to the trade of "Quin-Coco," and that its product has been retailed as "Coco-Quinine."

10. The defendant denies that its product is inferior in quality and medicinal properties to the plaintiff's product; but it avers that the medicinal action is due to the quinine content, and that the amount of this, according to the labels of both plaintiff and defendant, is the same in each case. It is denied that defendant's sals have ever unlawfully deprived the plaintiff of profits to which it was justly entitled. The defendant denies that it has by any unlawful act injured the reputation of plaintiff's product or in any way unlawfully interfered with the demand therefor, and that any act of defendant has resulted in defrauding the public by giving the public a different product from that demanded. It is denied that the defendants product is of less merit than the plaintiff's.

11. If the averments in paragraph 11 that the long continued use of the name "Coco-Quinine" has constituted it a valid trade mark, the defendant denies the averment. The defendant admits that "Coco-Quinine" has for many years been recognized in the trade as the product of the plaintiff. The defendant denies that the color of the plaintiff's product has caused such color to be recognized in the trade as identifying the product as being that of the plaintiff, and that the chocolate flavor of the plaintiff's product has come to identify said product as being that of the plaintiff. The defendant denies infringement of any exclusive right of the plaintiff to the said name or color or flavor. The defendant is advised, and so avers, that the plaintiff is not entitled to any valid trade mark or exclusive right whatever in the premises, either by reason of the said name "Coco-Quinine" or the color or flavor of his product.

The defendant denies that it is guilty of infringement of any lawful right of the plaintiff in the color of its product or
7 the flavor thereof. The defendant denies that it adopted the name "Quin-Coco" and the color and flavor of its product, and has used the same with the fraudulent and wrongful purpose and intent of unfairly and fraudulently diverting to the defendant part of the plaintiff's trade and to enable its product to be palmed off on the public as and for the product of the plaintiff. The defendant is advised, and so avers, that it has a legal right to manufacture and sell a compound of quinine and chocolate, under the name of "Quin-Coco," and of the natural color and substantially of the flavor of chocolate, and that in doing so it has infringed upon no exclusive right of the plaintiff in the premises.

The defendant denies that it has artfully and fraudulently or in any way whatsoever, through its salesmen, agents, druggists, dealers and confederates, heretofore or ever substituted or is now substituting its product for the plaintiff's product or has injured the plaintiff or deceived the public or done any act or thing in the premises contrary to equity or fair dealing. The defendant avers, on the contrary, that it is and always has been lawfully selling its said product on its own merits, and in so doing has not committed any wrong

against the plaintiff or deceived the public, but has extended its sales by means of a large force of traveling salesmen and by free samples.

12. The defendant denies that the plaintiff has any exclusive right to the use of the color or the flavor of its said product. The defendant denies that it has in any way infringed upon the plaintiff's exclusive rights, and that it has in any way unlawfully caused or is now unlawfully causing the plaintiff any pecuniary loss, and that any act on its part has wrongfully or unlawfully or otherwise affected the plaintiff's reputation as a manufacturer of medicinal products.

8 And the defendant, for a further defense to the bill of complaint, says that it has since —, 1908, and the Searle & Hereth Company from 1906 to 1908, openly sold the product "Quin-Coco" to the trade, and that this has been known to the plaintiff, and that notwithstanding such knowledge, the plaintiff has made no objection to such sales, except one objection made in October, 1909, that defendant's prices were too low.

Wherefore the defendant prays that the plaintiff's bill be dismissed, and prays its reasonable costs in this behalf most wrongfully sustained.

[SEAL.]

WM. R. WARNER & CO.
G. A. PFEIFFER,
Treas.

JOSEPH W. HENDERSON,
FRANCIS RAWLE,
For Defendant.

Deposition on behalf of the defendant taken before George Brodbeck, Esq., Special Examiner, at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Wednesday, November 24, 1915, at 10 o'clock a. m.

Present:

George Brodbeck, Esq., Special Examiner.
E. W. Bradford, Esq., representing the Plaintiff.
Francis Rawle, Esq., representing the Defendant.

GUSTAVUS A. PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

9 A. Gustavus A. Pfeiffer. 43 years old. Treasurer and General Manager of William R. Warner & Company. Residence, Philadelphia, Pa. I first became connected with William R. Warner & Company in July, 1908.

Q. 2. State briefly what had been your connection with the drug business before this?

A. I was connected with the retail drug business ever since I was a boy, first as a clerk, then as the owner of a drug store, and am a registered pharmacist, and was the owner of a drug store for about nine years. In 1901 I assisted in organizing the Pfeiffer Chemical Company, a manufacturing drug concern.

Q. 3. With headquarters in St. Louis?

A. With headquarters in St. Louis.

Q. 4. What are your affiliated companies at present?

A. At present the companies with which we are affiliated are The Searle & Hereth Company, the Dr. Earl S. Sloan, H. E. Bucklen & Company, Pfeiffer Chemical Company, and the E. E. Sutherland Medicine Company, and several others.

Q. 5. When was the product "Quin-Coco" first marketed?

A. In the fall of 1906, by the Pfeiffer Chemical Company.

Q. 6. Why was it introduced?

A. To supply the demand for a chocolate quinine mixture with the taste of the quinine sulphate masked or disguised.

Q. 7. Will you state whether or not that demand existed prior to its first introduction?

A. It did.

Q. 8. Who makes it now, and since 1908, and who sells it and who distributes it?

A. It is manufactured by The Searle & Hereth Company, and it is distributed by William R. Warner & Company.

10 Q. 9. To what trade?

A. To the retail drug trade and to the dispensing doctor and to the jobbing drug trade.

Q. 10. In what size bottles or containers?

A. It is supplied in two ounce bottles, four ounce bottles, pint bottles, five pint bottles and gallon bottles.

Q. 11. Has William R. Warner & Company been its sole distributors ever since August, 1908?

A. Almost exclusively. For a time after August, 1908, the Pfeiffer Chemical Company invoiced goods under the firm name of the Pfeiffer Chemical Company and acted as distributors for "Quin-Coco" in the territory handled by the Pfeiffer Chemical Company. Later, however, the Pfeiffer Chemical Company discontinued using their name in selling goods to the trade and for some time past William R. Warner & Company has handled and is the sole and exclusive distributor.

Q. 12. From your experience in the drug business what would you say the therapeutic effects of this preparation are due to?

A. Due to the quinine sulphate contained.

Q. 13. What would you say were the advantages of the preparation?

A. The advantage of "Quin-Coco" is that it supplies quinine sulphate in minute crystals undissolved, very much sub-divided, and held in suspension by the cocoa. This facilitates administration and absorption, and on account of the pleasant flavor and taste of chocolate, makes the product acceptable to the patient.

Q. 14. To what extent is the bitter taste of the quinine masked in his preparation?

A. Almost completely.

Q. 15. What do you mean by facilitating absorption?

A. The preparation being in liquid form is easier assimilated by the organs, because naturally the product before absorption must be in such form in the digestive organs.

11 Q. 16. You would say it hastens assimilation by the organs?

A. I would.

Q. 17. That it assimilates more quickly than if the same amount of quinine were given in the shape of a pill?

A. It would.

Q. 18. What other, if any, principal ingredients are there in this "Quin-Coco?"

A. Yerba santa, vannilin, saccharin, and cocoa, and a syrup base.

Q. 19. Cocoa in a syrup base?

A. Yes, sir.

Q. 20. Explain that to the Court. What is meant by "syrup" in the drug business?

A. A mixture of sugar and water.

Q. 21. What part does the yerba santa play in this mixture?

A. To disguise the bitter taste of the quinine.

Q. 22. State whether or not the cocoa has the effect of disguising the bitter taste of the quinine?

A. It has.

Q. 23. What about the syrup and vannalin?

A. The syrup is used as a sweetener of the preparation, and is commonly used in medicine for such purposes. The vannalin is added as a flavor and to emphasize the flavor of the cocoa.

Q. 24. But in quite small proportions?

A. Vannalin is used in small proportions.

Q. 25. Have you made any personal experiments in order to demonstrate whether or not cocoa has any effect in masking the bitter taste of the quinine?

A. I have. I have made a sample of a mixture with a syrup base, using the same proportion of quinine as we use in "Quin-Coco" and without any other ingredients. I made another sample, using a syrup of cocoa as a base, and having the same quantity of quinine sulphate, and without any other ingredients *of* flavors. Upon

12 tasting these, I found the one with a cocoa base was markedly less bitter than the one without the cocoa.

Q. 26. You made those experiments yourself?

A. I made these experiments personally. I placed some of the two preparations I made in the bottles, which I produced.

(The bottles produced by the witness are offered in evidence and marked "Pfeiffer Experiment No. 1" and "Pfeiffer Experiment No. 2.")

Q. 27. Can you state what other qualities the cocoa imparts to the combination in "Quin-Coco" in respect of flavor and the fluidity of the mixture and so forth?

A. Besides assisting in masking the bitter taste of quinine sulphate, the cocoa acts as a thickener of the mixture, and has the property of holding the undissolved quinine sulphate in suspension. It also makes the product opaque in this way, hiding the fact that the quinine sulphate is not dissolved. Further, it gives the preparation a chocolate flavor and taste. It also is important in preventing precipitation or settling of the quinine sulphate to the bottom of the bottle, thus enabling the making of a preparation which is pharmaceutically satisfactory.

Q. 28. What is the nature of the preparation in regard to its fluidity and touch, if you choose?

A. It is a thick and rather viscid mixture.

Q. 29. Will you state whether cocoa, that is to say, chocolate, using the broader term, is a popular flavor, and how popular?

A. It is a popular flavor, and is probably the most used flavor of any single flavor.

Q. 30. Will you state whether or not the particles of quinine sulphate are in solution in Quin-Coco.

A. They are almost entirely undissolved.

Q. 31. What would be the relation of the solution of the quinine sulphate in this preparation and its bitterness?

13 A. If the quinine sulphate was all in solution, the preparation would have a bitter taste.

Q. 32. Does undissolved quinine exist in a crystalline form?

A. Usually.

Q. 33. Does it so exist in this preparation?

A. It does, as I have tested it under the microscope.

Q. 34. Explain a little bit more fully what is the advantage of an opaque drug?

A. The advantage of an opaque mixture is limited to those mixtures which have not the ingredients in complete solution. This is to overcome the objection which patients have to taking muddy mixtures or mixtures with precipitates in the bottom, and the opaqueness tends to hide the undissolved ingredients and precipitates, giving the product a more appetizing appearance.

Q. 35. Dr. Francis, one of the plaintiff's witnesses, testified, in his opinion, in substance, that in "Coco-Quinine" the quinine sulphate was in solution. What have you to say about this?

A. Dr. Francis is mistaken.

Q. 36. Give your reason.

A. Almost all the quinine is undissolved and held in suspension.

Q. 37. You have now mentioned certain effects of cocoa in this mixture. Please state your opinion as to how far the cocoa is essential to the preparation, and whether any other ingredient could replace it, in your opinion?

A. I could not make the preparation without it, and I know of no other ingredient which could be used in its stead.

Q. 38. Upon what do you base those statements?

A. On experiments made.

Q. 39. State whether or not you have ever known or seen a

14 liquid mixture which satisfactorily disguised or masked the taste of the quinine without the use of chocolate or cocoa?

A. I have not.

Q. 40. State the difference between chocolate and cocoa.

A. Cocoa is chocolate with most of the cocoa butter pressed out.

Q. 41. Usually and commercially does some of the butter remain in the cocoa?

A. It does.

Q. 42. What becames of the cocoa butter taken out of the chocolate?

A. It is sold as a commercial product.

Q. 43. Under that name?

A. Under the name of cocoa butter.

Q. 44. Why do you prefer to use cocoa instead of chocolate in your "Quin-Coco"?

A. Chocolate contains an excess amount of butter fat which would separate upon standing or in shaking and in shipping goods from maker to user.

Q. 45. What similarity in therapeutic effect, in your opinion, is there between your "Quin-Coco" and Lilly's "Coco-Quinine"?

A. I would say they were similar.

Q. 46. What is the usual unit of a dose of quinine?

A. This varies, but a two grain dose is the more popular.

Q. 47. And in multiples of two?

A. In repeated doses.

Q. 48. In respect of the thickness of the mixture, do you know whether there is any difference between these two preparations.

A. From actual experience, no. I have been told that "Quin-Coco" was the thinner.

Q. 49. When the Pfeiffer Chemical Company first put out its "Quin-Coco" in the fall of 1906, state whether or not it was listed in your catalogue and given to your salesmen to sell over the country?

15 A. It was listed in the catalogue of the Pfeiffer Chemical Company, and the preparation was announced to the travellers, they were advised to accept orders for "Quin-Coco." At that time we employed about thirty-three travellers.

Q. 50. From what sources did the demand prior to 1906 for a liquid preparation of this sort come?

A. It came from the retail drug trade and from dispensing doctors.

Q. 51. What are "dispensing doctors," and how general is the practice?

A. As generally understood, a dispensing doctor is a doctor who carries and dispenses a preparation direct to the patient as against the prescribing doctor writing the prescription and sending the patient to the drug store to obtain the medicine. The practice of dispensing medicines has grown very materially in the last twenty-five years.

Q. 52. Among the doctors?

A. Very materially among the doctors in the last twenty-five years, and at the present time I should estimate that about one-half of the doctors could be classed as dispensing doctors.

Q. 53. Are some of them interested in drug stores?

A. Many doctors are interested in drug stores. Usually when

a doctor becomes interested in a drug store, he ceases to be a dispenser and writes prescriptions for that drug store.

Q. 54. What influence has the increase or diminution of malaria as a disease throughout the county upon the demand for quinine products?

A. Quinine being a popular treatment for malaria, naturally its use would increase and decrease in accordance as malaria increased and decreased.

Q. 55. Can you give any opinion as to whether malaria has increased or decreased in the last ten years?

16 A. I have travelled some in the south. I have noticed improved drainage, and from observations I would say that malaria has decreased. I know in the State of Iowa when I was a boy there was a great deal of malaria and at present there is none whatever.

Q. 56. About what percentage of your sales are direct to retailers and dispensing doctors?

A. Seventy-five per cent.

Q. 57. How does Warner & Company sell their goods?

A. We employ a large force of travelers. At present we have between 75 and 80. These travelers regularly call on the retail drug trade and dispensing doctors. We also distribute literature to our customers and others through the mails and with the products. We also sample our products in response to requests from the trade and as suggested by our travelers and from time to time we sample largely direct from mailing lists which we purchase from circularizing companies.

Q. 58. You mean you distribute samples in containers, bottles or other containers, is that the idea?

A. Yes. The samples are finished in accordance with the nature of the product. If a liquid it is in a bottle, if a tablet it may be either in a bottle or a box, and if a powder in paper; if an ointment, in a tin can.

Q. 59. Do you advertise in the medical drug trade journals?

A. Not at present.

Q. 60. Do you advertise in newspapers?

A. Not the pharmaceutical lines, which covers products of the William R. Warner Company and the Searle & Hereth Company.

Q. 61. How much of the United States do these salesmen cover, how often do they call upon substantially all of the druggists and dispensing doctors in their territory?

17 A. Our aim is to cover the entire United States and our travelers call on the dispensing doctors and druggists from one to six times a year, this in accordance with the territory assigned them.

Q. 62. What was the expense of maintaining this force of salesmen in 1914?

A. Between $250,000 and $255,000.

Q. 63. Of what are your sales of Quin-Coco the result?

A. They are the result of demand for a preparation containing quinine sulphate with the taste disguised, and the result of sampling

we have done with this product and of our efforts in selling the product.

Q. 64. I understand that the retail druggists, the wholesale druggists, sometimes called jobbers, and the dispensing doctors, all buy direct from you?

A. That is correct.

Q. 65. Has the plaintiff a definite method of selling his products which is different from yours, and if so, what is it?

A. As it is generally understood in the trade, Lilly confines the sale of his products through the jobbing drug channel. He employs salesmen to solicit orders from retail druggists and dispensing doctors. The orders from the dispensing doctors are usually filled through the retail drug trade, the orders from the retail druggists being filled through the jobbing drug trade. I don't know whether or not Lilly makes any exception to this general policy, nor what they are. Our policy is to solicit orders from retail druggists, from dispensing doctors and from jobbers, shipping and filling the purchase direct to the purchaser, whether he be a retail druggist, dispensing doctor, or jobber.

Q. 66. Do you know whether the plaintiff solicits or details any dispensing doctors?

A. I understand that he does.

Q. 67. What does "detail" mean in this connection?

A. To demonstrate your preparation, to the physician, either with or without a sample.

18 Q. 68. Are there other drug manufacturing houses who have other methods of sale than those two methods you have just mentioned?

A. Yes, there are some firms who sell only to the retail drug trade; some firms who sell only to dispensing doctors.

Q. 69. Then I understand that your method reaches all classes of purchasers who wish to buy your preparations, whereas the Lilly method and the other methods you have mentioned are limited to a class of purchasers as direct customers?

A. That is correct.

Q. 70. Referring to pint bottle of your product, Quin-Coco, is that and was it when you adopted it a stock bottle in common use?

A. It was.

Q. 71. Both as to color and shape?

A. It was.

Q. 72. What do you know about the word "Lilly" painted in red on Lilly preparations?

A. All the Lilly products that I have seen bear the word "Lilly" in red ink.

Q. 73. In script type?

A. Yes.

Mr. Rawle offers in evidence copy of the trade mark "Lilly" marked "Defendant's Exhibit, Lilly trade-mark."

Q. 74. What is meant in this business by "specialty?"

A. "Specialty" as usually used, means a product introduced by

the firm marketing the same. Oftentimes the word has a broader meaning and includes preparations to which the manufacturer has given a special name or special dress.

Q. 75. May it be a secret or an open formula?

A. It may be either.

Q. 76. Which is it usually?

19 A. When specialties were first introduced they were almost entirely secret. Of recent years, however, quite a number of them have open formulas. I am unable to state which is the larger proportion.

Q. 77. Does your house put out a number of specialties?

A. We do.

Q. 78. Does the Lilly house put out any specialties of the same or similar preparations put out subsequently to your putting out your corresponding specialty?

A. They do.

Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

Q. 79. Can you furnish a list of such?

Same objection.

A. I can furnish a list of preparations of specialties of various firms, including those of William R. Warner & Company and the Searle & Hereth Company, giving the name of the Warner, Searle & Hereth and the manufacturers' preparation and the corresponding preparation marketed by Eli Lilly & Company and first marketed by Eli Lilly & Company subsequent to the marketing of the product by the manufacturer who markets the original specialty. In making out this list I have used the Lilly Company's 1913-14 catalogue. The tabular statement which I produce, contains in the first column the name of the article as originally and first introduced; and in the second column the name of the original introducer, and in the third column the name of the product as subsequently introduced by the Lilly Company, with the page in the Lilly catalogue.

Q. 80. To make the matter clear, is it correct to say, taking an instance, that William R. Warner & Company originally introduced Syrup of Tolu and Heroin, and that at a subsequent date the

20 Lilly Company introduced Syrup of Tolu Comp. and that the two preparations are pharmaceutically similar?

Same objection.

A. That is correct.

Q. 81. What can you say as to whether the various Lilly products on column 3 of this list are pharmaceutically similar to the corresponding production of the original house on the first column of your list?

Same objection.

A. Many of them are.

Q. 82. Name some which you think are?

Same objection.

A. Calomel and bismuth powder, Lilly, is similar both in physical appearance and formula to Calalactose, S. & H. Digestive Comp. powder, Lilly, is similar both in physical appearance and therapeutic action to Compound Digestive Powder, S. & H.; Elixir Salicylic Acid Comp., Lilly, is similar to Elixir Salicylic Comp., Warner. Guaiacol Comp., Lilly, is similar to Guaiatonic, S. & H. Elixir Lactated Pepsin, Lilly, is similar to Lacto-Peptine, New York Pharm. Co. Eucalyptus Thymol Antiseptic, Lilly, is similar to Listerine, Lambert Pharm Co. Tritici, Lilly, is similar to Tritica, S. & H.

Q. 83. State whether or not, in answering above that many of the articles in the third column are similar to those in the first column, you mean that there is no similarity between the others and them?

Same objection.

A. The similarity between the product exists both as regards their therapeutic action and their physical appearance. Some of these products have similar therapeutic action, but vary in physical appearance, while others are similar both therapeutically and physically.

21 Q. 84. State whether or not the items in the third column are such as to be in competition with the corresponding article in the first column.

Same objection.

A. They are.

Q. 85. State whether or not the articles in the third column are such that they could be used with practically the same effect interchangeably with the corresponding article in the first column?

Same objection.

A. Yes.

Mr. Rawle offers in evidence the list produced by the witness, which is marked "Defendant's Exhibit, G. A. Pfeiffer's list of Lilly products."

Mr. Bradford: The offer and exhibit is objected to for the same reasons as stated in the objection to the testimony based thereon.

Q. 86. In the drug business as a whole, and the vast amount of drugs and preparations which we all know of and see in the druggists', can you give an estimate of about how many items are being more or less sold in this country?

A. I would be unable to make any accurate statement, but 125,000 different kinds would be far below the actual number.

Q. 87. Can you classify these in a large sense?

A. They can be divided in chemicals, of which Warner lists practically none; in patent medicines, of which Warner lists practically none; in pharmaceuticals, which embody practically all the Warner

line. Pharmaceuticals may be subdivided into specialties and miscellaneous preparations, of which Warner lists several hundred; into fluid extracts, of which Warner lists over 400; into tablets, of
22 which Warner lists over 1,200; elixirs, of which Warner lists over 200; syrups, of which Warner lists over 50; tinctures, of which Warner lists over 25; capsules, of which Warner lists 6 or 8, besides, several other minor subdivisions.

Mr. Bradford: The last two questions and answers are objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

Q. 88. To what extent are there preparations of the various drug houses which could be used interchangeably without the doctor or the user knowing it?

Same objection.

A. There are quite a few thousand.

Q. 89. To what extent are these interchangeable drugs and preparations put on the market by a number of different drug houses?

Same objection.

A. They are marketed by practically all pharmaceutical and chemical firms, chemical manufacturers.

Q. 90. When you say that they are interchangeable, what have you to say as to whether or not the patient, getting one or the other, would know the difference?

Same objection.

A. He could not know the difference.

Q. 91. Then, if a prescription mentioned one of these interchangeable drugs, it could be filled by the druggist, so far as the patient is concerned, by the use of any of the interchangeable drugs of a number of houses?

Same objection.

A. It could.

Q. 92. If the prescription specified one of these interchangeable drugs, but named the maker, what would be the duty of the druggist?

A. To supply the make or brand specified.

Q. 93. To what extent are drug stores stocked with these
23 interchangeable drugs of the make or brand of several different houses—do they carry the makes of several houses?

Same objection.

A. Very often they do.

Q. 94. In filling or not filling a doctor's prescription, specifying a particular drug, upon whose honesty does the matter depend?

A. Upon the party who fills the prescription.

Q. 95. You were in the retail drug business for a number of years

and in the manufacturing drug business for many years; can you state what is considered to be the ethics on this subject?

A. To fill the prescription exactly as written.

Q. 96. How far, in your experience, is this understood among the druggists and the officials to be the ethics of the drug business?

A. Universally.

Q. 97. What, in this code of ethics, is thought of the druggist who, without informing the prescription writer, fills a prescription with a drug other than the one mentioned therein?

A. He is considered dishonest.

Q. 98. From your experience in the retail drug business and manufacturing drug business, to what extent do you think that this ethical code, which you have mentioned, prevails, and is recognized as followed by the retail druggists?

A. I personally have never known of any one substituting one article when another article was specified on prescription. I further feel that it is generally known and understood that the relation of the retail druggist is confidential, both toward the prescriber and the patient. In filling the prescription the dispenser can infer the ailment of the patient, and he has no right to divulge information which he obtained through this confidential relation. In
24 addition, it is the dispenser's duty to carefully examine the prescription to discover any possible errors of the prescriber. Especially is this true in the case of poisons, to discover and correct any possibility of over-doses. Further, he has no right to use an article in place of the one specified. Doing so brands him as being dishonest, violating a confidence, and committing a reprehensible act. As regards our firm, we have never authorized or suggested any one to use any products we make in place of the product specified. In all our instructions to the travellers, this point is not only discussed, but emphasized. Further, we point out the objections to such a practice. We consider it not only unethical, but a violation of confidence on the part of the dispenser.

Q. 99. What is your opinion, based upon all these years of experience, of the morals of the retail druggist?

A. As a whole, I consider them very high—above the average of the ordinary commercial man.

Q. 100. How far do you consider the drug business properly carried on is fundamentally based upon the personal honesty of the retail druggists in the country?

A. Almost entirely so.

Q. 101. I hand you "Complainant's Exhibit, Document No. 3." Please state what this list contains in respect of Warner's products?

A. Over 90 per cent of the products we make are competitive. Most of these are listed under the same names, while others, although alike therapeutically and in formula, have names different from the competitors' product. This list contains a majority of this second class of items. Some of the products are similar physically, while all of them are similar from the standpoint of the formula and therapeutic effect. This refers to the articles listed opposite each other in the first and second columns. None of the preparations in the second

column are similar in dress and make-up to the articles in the
25 first column, and many of them are very much different in physical appearances, character and so forth. The purpose of that list was for the convenience of our pricing department, of our salesmen, of our druggists and doctors' customers, and to enable them to find preparations similar to each other. In this respect it might be termed a finding list. In a sense, we considered this list as a supplement to our catalogue. We distributed the same to our travellers, to dispensing doctors, and we have heard of travellers of competitors carrying the same.

Q. 102. Are there items in this list which were first put out by any one of your houses and afterwards a similar article was put out by some other house?

Mr. Bradford: I object to that question as immaterial, irrelevant and incompetent.

A. There are.

Q. 103. Are there any preparations made up from the United States Pharmacopœa or the National Formulary on this list?

A. Not any that I know of under the same name, except I notice at least one which is listed in the United States Pharmacopœa, Syrup of Hypophosphates, Comp., which I think is a U. S. P. product. There may be others, but I would be unable to identify them without referring to the U. S. P. and the National Formulary.

Q. 104. Does this list contain, to any extent, or any large extent, your fluid extracts, tinctures, elixirs, syrups, pills and tablets?

A. It does not.

Q. 105. About how many such do you put out similar to the like products of other houses?

A. 2,000 or more.

Q. 106. How far do the other houses in respect of those preparations put out a like or greater number?

A. It varies, but I would say it averages about the same, with all the prominent drug manufacturers.

At one o'clock P. M. a recess was taken until two o'clock P. M.

26 (After Recess.)

Q. 107. What are "line pharmaceuticals"?

A. They are a list of pharmaceuticals which are marketed by different firms under the same name and are subdivided in fluid extracts, elixirs, tablets, tinctures and syrups, wines, pills and several other subdivisions.

Q. 108. They are entirely similar pharmaceutically and are all marketed under the same name substantially?

A. Practically.

Q. 109. They are all similar pharmaceutically, though made by different houses, and are practically marketed under the same name?

A. Yes. But under the manufacturer's individual label.

Q. 110. Before the Lilly Company marketed its Coco-Quinine product, say about 1900, was there a demand in the trade for quinine sulphate with the taste of the quinine masked, and if so, how was that demand met by the drug trade?

A. There has always been a desire to mask the bitter taste of quinine, and this demand was filled by supplying coated pills and tablets, by elixirs, by marketing special syrups of quinine. Some of these, however, did not contain quinine sulphate, but contained the less bitter alkaloids of cinchona bark, which alkaloids have similar therapeutic action. To illustrate, quinine tannate, quinidine alkaloid, cinchonidine alkaloid; also the retail druggist often disguises the bitter taste of quinine by dispensing it at the soda fountain in soda water, such as coffee flavor and chocolate flavor, chocolate soda, and the quinine sulphate was also disguised in powders by being prescribed mixed with powdered chocolate and sugar. In addition there were vehicles on the market for disguising the bitter taste of quinine.

These were intended for extemporaneous preparation—that
27 is, the mixture was made at the time the prescription was written or the product was sold or the dose taken.

Q. 111. State whether or not other drug manufacturing houses have within the last fifteen years put on the market and sold chocolate or cocoa and quinine mixtures similar to Quin-Coco?

A. They have. There are quite a number of such preparations on the market and have been for a great many years.

Mr. Bradford: The question and answer objected to unless the witness antedates the complainant's product.

The Witness: Some of these were on the market before Quin-Coco was marketed.

Q. 112. Please produce samples of such products that have been on the market as you say for some years?

A. I produce the following, giving the name of the product, together with the name of the respective makers:

"Syrup Quinine, with Chocolate;" H. K. Mulford Co., Philadelphia;

"Wampole's Chocolate Quinine," Henry K. Wampole Company, Philadelphia;

"Quin-Choc," First Texas Chemical Manufacturing Company, Dallas, Texas;

"Koquin," John T. Milliken & Co., St. Louis, Mo.

"Chocolate Quinine Syrup," Tilden Company, New Lebanon, New York, and St. Louis, Mo.;

"Quinico," Mayer Bros. Drug Company, St. Louis, Mo.;

"Chocolate Quinine," Burrough Bros., Baltimore, Md.;

"Quin-coco-ine," the Harvey Company, Saratoga Springs, New York;

"Chocolate Syrup of Quinine," the William A. Webster Company, Memphis, Tenn.;

28 "Cocoa & Quinine Comp.," Henry S. Wampole Company, Baltimore, Md.;

"Choquin," William S. Merrell Chemical Company, Cincinnati.

Mr. Bradford: The question and answer and offer of exhibits I object to as irrelevant and not competent to prove any issue in this cause.

Q. 113. Are there others?
A. There are.

Mr. Rawle: I will produce others when received.

Q. 114. What knowledge have you as to the original date at about which any of these products were put on the market?
A. I know that several of these products were on the market prior to the time when Quin-Coco was first marketed. Among these are Syrup of Quinine with Chocolate, H. K. Mulford & Company; Wampole's Chocolate Quinine, Henry K. Wampole & Company, Philadelphia. I am unable to state the exact date of marketing of the others. Some of them were marketed either just before or at about the same time Quin-Coco was first marketed.

Mr. Rawle: I will produce evidence as to dates later on.
Mr. Bradford: The last question and answer are objected to for the reasons previously given.

Q. 115. Can you state from an inspection of the labels of these respective bottles just offered how far the contents are respectively a similar preparation to Coco-Quinine or Quin-Coco?

Same objection.

A. The quinine content of the preparations varies to some extent; but, as a whole, the quinine content is about the same as that of Coco-Quinine, Lilly, and Quin-Coco, S. & H.

29 Q. 116. Do they all contain chocolate or cocoa as an ingredient?

Same objection.

A. They do.
Q. 117. State whether or not these various preparations you have just introduced are in competition and have been for some years on the market with Coco-Quinine, and more or less extensively offered for sale and listed?

Same objection.

A. They have.
Q. 118. What have you to say as to the business standing of the drug houses putting out these products?

Same objection.

A. They all have the reputation in the trade as being reliable houses. Some of them have a national reputation, while a certain few do an international business as well. Among the latter are H. K. Mulford & Company, of Philadelphia, and H. K. Wampole & Company, of Philadelphia, who have an international reputation.
Q. 119. I think you said that the Lilly Company especially de-

tails—that is to say, solicits the business of—prescription doctors, and that you did not; is that correct?

A. That is not quite correct. Prescription doctors have no business to solicit. They are prescribers and not purchasers of medicinal products, as a rule.

Q. 120. I did not mean to ask you whether the Lilly Company solicited the business of the prescribing doctors. I merely meant to ask whether the Lilly Company "details" the prescription doctors?

A. They do.

Q. 121. And your company does not?

A. We do to a limited extent.

Q. 122. And by "detail," do you mean that a salesman
30 visits a prescription doctor and talks about all the merits of a particular drug and hopes to induce him to prescribe it?

A. That is correct.

Q. 123. What effect on the druggists, as to carrying a particular make of goods, does this detailing work among the prescribing doctors have?

A. It creates a demand for that special product.

Q. 124. What do the druggists then do?

A. Supply the demand.

Q. 125. That is, they thereupon keep it in stock?

A. They stock the item and supply the demand.

Q. 126. In this way—that it, by the action of the prescribing doctors of the kind I have mentioned—is that particular product so detailed more fully brought to the attention of the drug stores?

A. Yes.

Q. 127. Please state among what classes of customers your market lies?

A. Among the dispensing doctors, retail druggists and jobbers.

Q. 128. How many doctors are there in the United States, and how many of them are dispensing doctors?

A. They are over 130,000 doctors. I have previously stated that, in my opinion, about 50 per cent. are dispensing doctors. This would mean over 65,000 dispensing doctors. I have before me the classified list of professions and trades in the United States, published by the Howe Addressing Company, of Philadelphia—the issues of September, 1915, which gives the number of the physicians by states, with an aggregate number of 137,760.

Counsel stipulates that the Howe list produced by the witness may go into the record as being a list of physicians in the United States classified by states, and that the list is published by a responsible house in Philadelphia, and bears the inscription on the front page as follows:

31 "Howe mailing lists guaranteed 99 per cent correct." "The Howe Company agrees to furnish a list of all doctors in the United States by states with their respective addresses."

Q. 129. What proportion of your output is sold to dispensing doctors?

A. I am unable to state accurately, but in my opinion it is about one-sixth of our sales of pharmaceutical preparations.

Q. 130. You have said that you had a market with retail druggists throughout the country. Upon what calls, either by prescription or over the counter, could a retail druggist dispense your product other than for the direct call of Quin-Coco?

Mr. Bradford: That is objected to as calling for the witness' opinion, and not for any evidence of value in determining questions at issue.

The Witness: As an ex-retail druggist, this could be dispensed on calls for a cough syrup, especially those with grippy tendencies. It could be dispensed upon calls for a sweet syrup of quinine. It could be dispensed upon calls for a tasteless quinine. It could be dispensed upon calls for a chocolate quinine. It could be recommended by the druggists in cases of coughs, colds and malarial conditions, such as chills and fever. A retail druggist could in many ways dispose of this product other than for calls for either Coco-Quinine, Quin-coco, or even chocolate syrup of quinine.

Q. 131. What about calls for a dose of quinine?

A. The retail druggist could point out the advantage of taking quinine in a preparation that disguises the taste, and especially would this be true if it was difficult for the patient to take pills or tablets, or the patient was nauseated by the bitter taste of quinine.

Q. 132. Have you referred to calls for Quin-Coco as one of the occasions on which a druggist might sell it?

32 A. I have not, but I assumed, of course, that he could sell it on such calls.

Q. 133. Can you state the aggregate sales in dollars of Quin-Coco during the past year or any period?

A. I am unable to give any accurate statement of this because we do not keep a record of such sales in our statistical department; but, judging from the amount made, the sales in 1914 were over $12,000 and less than $13,500.

Q. 134. What have you to say as to druggists recommending Quin-Coco to their doctors and asking them to prescribe it?

A. That is quite a common practice. Druggists very often stock a product which is similar to a nationally advertised or a nationally detailed product, and in a sense act as "detailers" for the manufacturer of the competitive product, interviewing the doctors and requesting them to write prescriptions for the competitive preparation.

Q. 135. Is that considered proper practice on the part of the druggist?

A. It is.

Q. 136. How far, in your opinion, as experienced in a retail drug business, can a druggist, by personal effort, increase the sale of any product or products?

A. A retail druggist can sell almost any product he chooses, and in fact create a demand for such products. This has been and is being done continually. There are some firms in the trade who

market products almost the entire sale of which depends upon the druggist's recommendation and interest in those products. Some of these firms are national in their scope, and have sales in excess of a million dollars each. Oftentimes customers come into the store asking the druggist's opinion as to the product they should use. In many communities, or in some communities, the druggist is looked upon as possessing more or less ability in this direction, and
33 is often called "Doc" or doctor. This is especially true in the Southern states, where it is common practice to call a druggist "Doc."

Q. 137. How about orders from jobbers?

A. We have received orders for Quin-Coco from a great many jobbers, almost all of which were unsolicited.

Q. 138. What proportion of the jobbers in the country would this cover?

A. I am unable to state accurately, but I should judge about one-third of all the jobbers.

Q. 139. What about mail orders?

A. We have received mail orders for Quin-Coco continuously. From an examination of the orders which I have made casually from time to time, I should judge the orders for Quin-Coco average, with those for our other products, everything considered.

Mr. Rawle offers in evidence the Howe Addressing publication referred to above, giving the list of retail druggists in the United States, classified by states, as 53,773.

Q. 140. Does that fairly represent your own estimate of the number of druggists in the United States?

A. That is more retail druggists than I thought there were. I thought it was between 43,000 and 46,000.

Q. 141. What is it that has brought about your sales of Quin-Coco?

A. First, a demand for a chocolate mixture containing quinine sulphate and disguising its bitter taste.

Second, efforts we have made to create a demand, this through samples and through our usual business efforts to increase and extend our business.

Third, through efforts of the retail druggists in inducing doctors to use and inducing consumers to buy Quin-Coco.

Fourth, from the dispensing doctors, from whom we solicit
34 direct, and who use Quin-Coco, in their practice, dispensing it in those cases where they feel such a product is indicated.

Fifth, We have received orders from the jobbers, who in turn supply the retail druggists and dispensing doctors. We also expect our sales organization, which we continue at a large expense, to extend and increase the sale of all our products, including Quin-Coco. These salesmen, in addition to soliciting orders from the retail drug trade and dispensing doctors, also use their spare time in detailing and calling upon the prescribing physicians.

Q. 142. Do they spend their spare time in detailing the prescribing physicians, or is it on the entire line of items carried by you?

A. No, that is impossible. The preparations detailed vary with the salesmen and with the territory.

Q. 143. Will you please state to what extent your salesmen, before they are put to work, are instructed by the officers of the company or others, in the performance of their duties as salesmen?

A. They are given what we consider a good training and a demonstration of our products and policies. Personally I have done a great deal of this work, and did it entirely during the absence of Mr. H. Pfeiffer, who in the last five years has been away traveling perhaps more than half the time. The usual practice is to have the salesman come to the house and have him spend a little time in each of the departments, to acquaint him with the various lines we supply. He is given a set of catalogues to study, and before leaving for the territory, I always made it a point to personally review his visit and go over the matter of selling with him. I deemed this work so important that I had made an outline of the different points I would take up with the salesman. These points cover and review all his work in the department, a review of his contract and territory, a review of our policies regarding our different lines, and a review of our policies regarding other lines, also requirements of a successful traveler. Under this heading I discussed character, industry, knowledge of human nature, knowledge of business, knowledge of goods, knowledge of prices, and particularly dwelt upon character as the best asset which not only a traveler but which any individual could possess. I also pointed out the need of his help, loyalty and co-operation to increase his firm's success. Under the point of policy, regarding our products, I pointed out our relations with our competitors and impressed upon him the disadvantages of making any false statements or soliciting any orders under false promises. I also talked about the question of substitution and pointed out to him that this was dishonest, no matter who did it, bringing out the point that the drug business was rightly ethical, that confidence must exist, that health and life depended thereon. I also reviewed our salesmen's "Confidential and Manual," and our list giving quantity, prices and special offers. This list was not generally distributed to the trade, but was used by our pricing and selling department. It contained nothing secret, and some of these lists were distributed among our competitors. In this salesmen's "Confidential and Manual" we have a section "What a Salesman Should Know." This is in numbered paragraphs. Paragraph 16 reads that "It pays to adhere strictly to the truth at all times."

Paragraph 17 reads that "It don't pay to speak ill or even mention your competitor".

There are other paragraphs. From the last page of this manual I quote the following:

"Our policy in dealing with the trade is briefly stated.

"1. We believe in honesty and fair dealing.

"2. To supply the best quality of products.

"3. To sell goods as low as possible consistent with quality.

"4. To ship orders promptly.

36 "5. To fill orders complete.
"6. To never speak ill of a competitor.
"7. To accord courteous treatment."

Knowing the tendency of the salesman to make promises and statements in his desire to get an order, we would emphasize the need of restraint in this regard, and impress upon him as strongly as we can the need of honesty and fair dealing in his relations with the trade. We impressed upon him also that he is the firm's representative and the house or his firm is judged by him. If he makes a false statement or uses unfair methods, the house is judged in that light.

Q. 144. How far back was this manual in use?

A. The oldest copy which we have on file containing the matter quoted is dated 1911. I don't know whether previous copies contain this matter or not, as we have none on file. Each salesman is supplied with one of these "Confidentials". I would add also that my connection with the selling department is limited to salesmen who work in the territory handled by the Philadelphia office. For convenience our sales organization is divided, part being handled by the Philadelphia office and the other part being handled by the St. Louis office.

Q. 145. Have you any older written matter from which you taught the salesmen?

A. Yes, I have a little vest pocket memorandum which I use in connection with this outline, in fact reference to this booklet is made on the outline, so that I would not overlook reviewing this also. This vest pocket memorandum contains other points to take up with the salesmen, among which are salesmen's expenses, salesmen's sundry points, mailing orders promptly, never talking about competitors. I quote the language of one clause on page 14, reading as follows:

"Never talk about your competitors."

This booklet has other points, such as the disadvantage of
37 talking dull times and discouraging the buyer, and so forth.

I have carried this booklet for over eight years, had it in my possession before coming to Philadelphia, which was in June, 1908.

Q. 146. In thus instructing your salesmen before sending them out on the road, you are instructing them as I understand, to take out a line of many thousands of items. How many thousands are there?

A. Over 5,000.

Q. 147. Have you ever had any information or knowledge except from the plaintiff's testimony in this case of a retail druggist selling or dispensing your product, Quin-Coco, on a physician's prescription or on a call over the counter when Eli Lilly & Company's product, Coco-Quinine was called for or specified?

A. Never.

Q. 148. Have you ever, directly or indirectly, authorized any retail druggist to do so, or in any way whatever suggested to any retail druggist that he could do so?

A. Never.

Q. 149. Have you ever had any information or knowledge except from the testimony in this case that any salesman of William R. Warner & Company had ever suggested to any retail druggist that he could dispense William R. Warner & Company's product, Quin-Coco, on a physician's prescription, or an a call over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically called for?

A. I have not.

Q. 150. Have you ever in any way, directly or indirectly, directed, authorized or suggested to any one of your salesmen, that he should or might suggest to any retail druggist that he could dispense your product, Quin-Coco, on physician's prescriptions, or on calls over the counter, when Eli Lilly & Company's product, Coco-Quinine, was specifically prescribed or called for?

A. I never have.

38 Q. 151. I think you said that the earliest Quin-Coco was put out in August, 1906, and that the defendant company had nothing to do with that product until August, 1908?

A. That is correct.

Q. 152. What can you say as to whether the plaintiff company had knowledge that that product, Quin-Coco, was on the market?

A. I am unable to state as to what knowledge they had of Quin-Coco being on the market, when first marketed, but sometime in September, 1909, I received a letter from Mr. Lilly, on the subject of Quin-Coco. I produce his letter, dated August 31st, 1909, which is in the following words:

8-31-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

MY DEAR MR. PFEIFFER:

Presuming upon our very pleasant acquaintance, I am going to put a proposition before you in the matter of Coco-Quinine. You are possibly aware that this preparation was entirely original with our house. This fact was fully recognized by our competitors with whom we hold pleasant relations. Mulford and Pfeiffer are the only ones who are making a preparation of the same nature. While it would probably be asking too much to make the request that you discontinue this preparation, we do think it would be reasonable to ask that you observe the same prices. We find that you are selling 5 pint bottles at $2.50 against our $3.30; pints at $7.20 a dozen against our $8.50 to the retail trade. Should you feel inclined to make your lowest price to the retail trade correspond with our prices, which are absolutely fixed, we would certainly appreciate it and be very glad to reciprocate whenever possible. If manufacturers were generally making this preparation, we would not be bold enough to make this suggestion.

Very truly yours,

(Signed) J. K. LILLY.

Mr. Rawle calls on plaintiff's counsel for letter from G. A. Pfeiffer, to J. K. Lilly, dated September 23rd, 1909.

Mr. Bradford: Counsel for complainant states that he has not the letter called for, but that he has requested the officers of the plaintiff corporation to furnish it and search of their files has failed to discover it.

Q. 153. Please produce your copy of your reply to the last mentioned letter?

A. I produce a copy. It is as follows:

Wm. R. Warner & Co.,
Philadelphia, Pa.,
639 N. Broad St.

September 23rd, 1909.

Mr. J. K. Lilly,
c-o Eli Lilly & Co.,
Indianapolis, Ind.

DEAR SIR:

Mr. H. Pfeiffer has returned and we have conferred with him concerning your letter of 8-31-09, referring to Coco-Quinine. In reply would state that we would almost prefer to discontinue supplying Quin-Coco rather than raise the price, not because we could not sell some of the goods at the advanced price, but because we know the tenor of the retail trade, and their objection to manufacturers' raising the price of a specialty, after he has induced them to stock, and frankly, we do not care to court the ill will of the trade.

In reference to discontinuing this preparation, we admit that Coco-Quinine was entirely original with your house, but we also make this claim for preparations Warner and The Searle and Hereth Co. market. To illustrate, we claim originality of Elixir Salicylic Comp., Tinct. Digitalis, Fat Free Tritica, Pils. Cascara Cathartic (Dr. Hinkle), and we beg to inquire whether you and the other members of the Homilia Club would agree to discontinue or raise your price on preparations similar to the above mentioned and other specialties, which we can prove were originally introduced by us. We would not be satisfied to have you agree to do this, but we would expect the other manufacturers to accord us the same treatment as they accord you on Coco-Quinine.

The writer feels the matter is of sufficient importance for a personal interview, for there are many positions which could be taken, among which is the fact that possibly you are deriving as much benefit by our pushing and selling Quin-Coco as you are suffering loss, for does not the fact that several houses are pushing the same preparation, enlarge the market for said product? It is not always true that a monopoly of a certain preparation acts to the benefit of the owner. We are very unbiased in our position, and, of course,

would not think of replacing any new specialty you or any of our other friends place on the market, but really, we do not feel it is fair and just to go back of the returns, unless we shall profit by a condition which causes us a loss, provided we are entitled to said profit.

Respectfully yours, ——— ———.

Q. 154. Can you produce any other letters from the plaintiff or from Mr. J. K. Lilly?

A. Yes, I have another letter dwelling upon the same subject, dated October 6, 1909, signed J. K. Lilly, and a letter dated January 11th, 1910, from J. K. Lilly, which is not signed by him, but identified as his letter by a printed slip bearing the name of J. K. Lilly pinned to the original letter when received. They are as follows:

Mr. G. A. Pfeiffer. 10-6-09.

MY DEAR MR. PFEIFFER:

I must confess to a degree of disappointment in the tenor of your letter under date of September 23, which arrived during my absence in the East.

41 Coco-Quinine was so entirely original with us and such a radical departure in the way of Quinine preparations that we have felt we were entitled to full consideration for it in the same manner that we have always endeavored to consider the rights of others in original, novel preparations. All reputable houses except yours have tendered this consideration and we were in hopes that you, in the light of our desire to work together to our mutual advantage, would at least consider our rights in the premises so far as not to cut under our prices.

It is beyond our power to meet the conditions outlined in your letter, for the reason that we cannot bind other manufacturers but it seems to me that there is an excellent opportunity for our two houses to extend full consideration. After all, it's just a matter between us and of course if this is your last word we will bow to your decision and have to be guided in the future by what we may consider our own best interests, although we much prefer to work together in a way that would serve the interests of both houses. If you can conceive of any way in which we could extend to you a consideration in return for making the same price that we do on Coco-Quinine, we will be very pleased to consider it. If not, then it is of course a closed chapter.

My observation has been that all of the houses profit by the proper consideration of others. If one gets out a specialty and puts money and effort behind it the others do not jump upon it like buccaneers; issue an imitation; cut the price and endeavor to profit by the efforts and expense of others. It seems to me that this is as it should be and if this principle is ignored everybody would be at everybody's throats and a very deplorable condition would result. This doesn't seem to be a sane proposition to me.

With best regards, I am,

Very truly yours,

(Sgd.) J. K. LILLY.

42

1-11-10.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

My Dear Mr. Pfeiffer:

I venture once more to address you on the subject of your Quin-Coco and the price thereof. Your action in pushing this preparation is directly in violation of one of the fundamental principles of the Homilia Club. If this Club means any one thing more than another, it means that members will not attempt to build up a business at the expense of a competitor. Coco-Quinine was absolutely and unquestionably original with our house and has been so recognized by all members of the Homilia Club. Only one manufacturer up to the time of your entering the Club made a preparation of that nature and upon taking the subject up with them, they immediately desisted from pushing it, and their preparation has virtually disappeared from the market.

You have taken our preparation bodily, simply transposing the name and are today energetically and actively offering it as a substitute for Coco-Quinine at $2.50 per five pint bottle against our $3.30. You are not creating any new demand to speak of, and are simply taking at a cut price, business that originated with and was built by Eli Lilly & Company.

There is no parallel to this condition in the Homilia Club and we file with you our earnest protest against your action in this matter. If you cannot see your way clear to withdraw this preparation from the market, we ask that you change the name to one that has not the slightest resemblance to Coco-Quinine and increase your price so that the lowest price to the retail trade will be $3.30 per 5 pt. bottle or $8.50 per dozen pints making no better prices in packages larger than 5 pint bottles.

In making this request we are keeping well within the spirit and the wishes of the Homilia Club such as are being carried out
43 every day by the members thereof.

We trust that you will receive this letter in the spirit in which it is sent and give same your kind and early consideration.

Very truly yours,

——— ———.

Q. 155. I hand you a letter signed J. K. Lilly. Did you receive this at about the time it bears date, and is it from Mr. Lilly?
A. I did, and it is signed J. K. Lilly. It is in the following words:

"Josiah K. Lilly,
Indianapolis.

2-2-09.

Mr. G. A. Pfeiffer,
Philadelphia, Pa.

DEAR MR. PFEIFFER:

Under separate cover there is coming to you a Red Lilly Catalogue for the current year.

Trusting that you will accept it with my compliments and best wishes for a profitable year for your good house, I am,

Very truly yours,
(Signed) J. K. LILLY."

Mr. Bradford: The introduction of this letter is objected to as having no bearing on the subject matter of this suit.

Q. 156. There is a reference in this correspondence to the "Homilia Club." What was that?

A. That was a fraternal organization of some of the prominent drug manufacturers for the purpose of discussing and solving the difficulties, common to all. It was especially helpful when arranging to meet the requirements of the Pure Food and Drugs Act of 1906. This being a new act, the regulations and rules for enforcement were more or less vague and indefinite. It was also
44 used as a register of preparations marketed by the different firms. This registration was under two classes. Class A embraced preparations on which the manufacturer claimed use of name only. Class B embraced preparations on which the manufacturer claimed ownership of both name and formula or product.

A booklet of these names was issued and distributed among the members, a copy of which I produce. This is the second issue of this booklet.

Q. 157. Please look at this booklet and state whether you find any registration of Eli Lilly and Company products in it?

A. I do, on the first page there are products listed under both classes, class A and class B. There is a note at the bottom of the page reading as follows:

"Class A, name only.
"Class B, name and formula."

Q. 158. State if Lilly's Coco-Quinine is registered and classified there and in which class?

A. It is registered in class A.

Mr. Rawle offers the booklet of the Homilia Club produced by the witness in evidence and particularly the registrations therein of Eli Lilly & Company.

The booklet is marked "Defendant's Exhibit Homilia Registrations".

Q. 160. Can you give the members of the Homilia Club?

A. I can remember most of them at the time I was a member. They were as follows:

Ernest Stauffen, of Sharp & Doehme; George S. Merrell, William S. Merrell & Company; F. K. Strearns, of Frederick Stearns & Company; Stuart Wyeth, of John Wyeth & Bro.; Milton Campbell, of H. K. Mulford & Company; W. A. Sailer, John Wyeth & Bro.; E. G. Swift, of Parke, Davis & Company; E. H. Nelson, of Nelson, Baker & Company; J. K. Lilly, of Eli Lilly & Company;

45 G. A. Pfeiffer, of William R. Warner & Company.

Q. 161. Did you have any discussion with Mr. Lilly in regard to referring this subject to a meeting of the Homilia Club?

A. Mr. Lilly and I talked of this subject at one time personally, when we happened to meet at Atlantic City. I am unable to give any definite outline of the conversation. I had forgotten that this interview took place until some time ago. Mr. Lilly refreshed my memory and I remembered the fact that the interview was had, but not what was discussed other than Quin-Coco was discussed during the interview. There was correspondence passed between us regarding referring the matter to a meeting of the members of the Homilia Club.

Q. 162. Then what did you do?

A. Before the next meeting of the Homilia Club I resigned from the Club.

Q. 163. What were your reasons for resigning?

A. There were several reasons. One was the question of salesmen, and the other was the question of Quin-Coco; and after conferring with the other members of the firm we decided that it would be advisable that I resign.

Q. 164. What was the "salesmen" reason?

A. One of the questions which the Homilia Club endeavored to regulate was the hiring of salesmen of the firms represented in the club by other members of the club. The plan was no house should approach a salesman of the other firm and should not hire this salesman until laying the matter before the firm employing the salesman.

Q. 165. You objected to this?

A. We did.

Q. 166. Why?

A. We did not like it and we did not think it was fair to the salesman.

Direct examination closed.

46 Cross-examination:

Mr. Bradford, without waiving objections, cross-examines as follows:

By Mr. Bradford:

X Q. 167. What reply did you make to the letter of January 11th, 1910, from Mr. J. K. Lilly?

A. I have a copy of my reply dated January 14th, 1910, reading as follows:

"Mr. J. K. Lilly,
c-o Eli Lilly & Company,
Indianapolis, Ind.

MY DEAR MR. LILLY:

Your letter of 12-1-10 received, and after being considered by the different members of the firm will be answered.

Respectfully yours."

——— ———.

X Q. 168. What further answer did you make?

A. I have the copy of my reply dated January 25th, 1910:

"Mr. J. K. Lilly.

DEAR MR. LILLY:

After further consideration of your letter of 1-11-10, we have decided that the subject is of too much importance to adjust through correspondence, and will be very glad to go over the matter with you in person some time when you are in the East, and when you can find it convenient to call at the office. Should the writer go West prior to your coming East, he will stop off at Indianapolis. The reason for this plan is our fear that correspondence might lead to unnecessary arguments.

Respectfully yours,

——— ———.

X Q. 169. Did any conference follow this letter of January 25th, 1910, and if so with whom and where?

A. I do not remember any.

47 X Q. 170. When was the conversation with Mr. Lilly at Atlantic City,—before or subsequent to this correspondence?

A. My recollection is that it was before any of it, before all of it.

X Q. 171. Did you have any correspondence with Mr. Lynn on this subject?

A. I don't remember.

X Q. 172. Did you have any conference with Mr. Lynn on this subject?

A. I do not remember any special conference. Mr. Lynn and I might have talked the matter over after the adjournment of the meeting of the Homilia Club of New York City. That is the extent of my recollection, and what was said at that time I could not say.

X Q. 173. I hand you a copy of letter dated February 14th, 1910, and ask you if that recalls any facts to your mind, and to state what the letter is, if you recognize it?

A. This is a letter dated February 14th, 1910, addressed to Mr. C. B. Lynn, reading as follows:

"DEAR MR. LYNN:

Subject: Coco-Quinine.

After further consideration, we feel it preferable that you register the complaint you have against us with all members of the Homilia Club and we will reply thereto. We consider your position raises an issue upon which each of the members of the Homilia Club should pass judgment.

Very respectfully yours."

——— ———.

I would conclude that that is a letter I wrote Mr. Lynn.
X Q. 174. Who is the Mr. Lynn to whom your letter is addressed?
A. Mr. Lynn, General Manager of Eli Lilly & Company.

By Mr. Rawle:

X Q. 175. Here present?
A. Here present.

48 By Mr. Bradford:

X Q. 176. I hand you copy of another letter dated March 7th, 1910, and ask you if you recognize it and if you will read it into the record and state what it is?

A. This letter is dated March 7th, 1910, and it is addressed to Mr. J. K. Lilly, Indianapolis, Ind. Immediately above Mr. Lilly's name are the following names: Ernest Stauffen, George S. Merrell, F. K. Stearns, Stuart Wyeth, Milton Campbell, W. A. Sailer, E. G. Swift, E. H. Nelson. The letter reads as follows:

"DEAR MR. LILLY:

I am today forwarding my resignation to Mr. Nelson, Secretary of the Homilia Club. This action is due to the fact that the firm I represent cannot meet your requirements on Quin-Coco, and for the further reason that when accepting membership, the writer was under the impression that preparations which were on the market prior to the formation of the club were not covered by the resolution adopted on new Specialties. This position we feel is confirmed by the minutes of the Homilia Club, and knowing that the Homilia Club was and continues to be a benefit to the members, rather than cause it any friction, the firm deem it advisable that I resign.

Very cordially yours,

G. A. PFEIFFER."

P. S.—Copy of this letter has been mailed to all the members of the Homilia Club."

X Q. 177. What was the substance of the resolution referred to in this letter relating to new specialties?

A. I have no definite memory as to the verbiage but the thought, as I recollect it, was that the Homilia Club would not discuss the question of priority of rights in a product which had been marketed prior to the formation of the Homilia Club.

X Q. 178. Did not this also cover the matter of registration with the club?

49 A. Perhaps it did. I could not state positively.

X Q. 179. Assuming that it did, would not this be a reason why Coco-Quinine could not be registered with that club in Class B by Eli Lilly & Company at that time?

Mr. Rawle: I object to the question as based upon an assumption and because the minutes of the Homilia Club are the best evidence, and because the witness has stated that he has no definite recollection of the verbiage of the minutes.

The Witness: That would depend upon the wording of the specific clause. It might have such an effect.

X Q. 180. Is it not true that you find in this exhibit list, products registered in Class A by other houses, the exclusive right to which products was and has been freely acknowledged by all manufacturers?

Mr. Rawle: That is objected to because the registrations of other houses are irrelevant and because the registration in the Homilia list by Eli Lilly & Company of Coco-Quinine claims only the right to the name "Coco-Quinine" and to nothing else.

Mr. Bradford: Counsel's last assumption is probably based upon a misunderstanding of the rules of the club as defined in the resolution the witness is testifying concerning.

The Witness: Yes, that is true. I find Adrenolin preparations registered in Class A by Parke Davis & Company. I know, however, that this product is protected by trade-mark and formula patent. No other firm could, if they chose, make or market this preparation.

X 180. Is it not true that except for the resolution to which you have referred, Parke Davis & Company might have registered these products in Class B?

50 Mr. Rawle: That is objected to because the language of the resolution is not testified to and because the act of Parke Davis in registering its product has nothing to do with the registration of Coco-Quinine by Eli Lilly & Company, which speaks for itself, independently of the registration of any other product of any other house.

The Witness: Parke Davis & Company could of course have registered their product under any class they saw fit, it being their own product?

X Q. 181. It was not a new product, at that time, was it?

Same objection.

A. I do not know. I do not know when they first marketed it.

X Q. 182. Do you have in your possession a copy of the Homilia Club resolution which was referred to in your letter of March 7, 1910?

A. I have turned all my papers over to my counsel, and I will look it up and if I find it I will produce it.

Adjourned until Friday morning, Nov. 26th, 1915, at 9.30.

Continuation of Depositions at the Office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Friday, November 26th, 1915, at 9.30 a. m.

Present: Parties as before noted.

G. A. PFEIFFER.

Cross-examination resumed.

By Mr. Bradford:

X Q. 183. Have you found the Homilia Club resolution which was referred to just prior to adjournment Wednesday?

51 Mr. Rawle: That is objected to because it does not sufficiently appear that these are the authentic records of the Homilia Club.

The Witness: I found what purported to be copies of the minutes and am unable to find in these the specific resolution covering a division of products in Class A and Class B. There are references to classification of products in Class A and Class B in these minutes, but I was unable to find the resolution specifically covering this subject.

X Q. 184. Your letter of March 7, 1910, to Mr. Lilly correctly states your understanding of the rules of the club as to this matter, I assume?

Mr. Rawle: That is objected to because the rules of the club must speak for themselves when the authoritative copy of the rule is proved, and because the witness' understanding of the rules is not relevant or admissible, and because the rule is not in itself admissible evidence, but only what the plaintiff did under the rule.

The Witness: The letter expresses an understanding which I then had and which I now have regarding specialties. It does not fully express our reasons for resigning, inasmuch as the question of "salesmen" affected all members of the Homilia Club, while the question of Quin-Coco affected Eli Lilly & Company alone and we did not feel it advisable to start a correspondence regarding the other question with the other members.

X Q. 185. On Wednesday I asked you if you remembered any conference with Mr. Lynn, General Manager of Eli Lilly & Company on this subject, and at that time you were unable to remember any except possibly a reference to it following a meeting of the Homilia Club in New York City. I ask if you have thought the matter over

since, and if so, if you have recalled any other conference with Mr. Lynn on this subject?

52 A. I have not thought the matter over especially, but without refreshing my memory, I cannot state of any other conference. I might answer that that I stopped off at Indianapolis visiting the firm of Eli Lilly & Company once upon my way to St. Louis, but at that time I do not remember of the subject of Quin-Coco or Coco-Quinine being mentioned. Neither do I know the time of this visit.

X Q. 186. From your direct testimony I understood that you are a registered pharmacist. I would like to inquire if you are also a graduate of a school of pharmacy?

A. I took one term in the Illinois College of Pharmacy, Chicago, Illinois, but did not graduate.

X Q. 187. As a pharmacist, do I understand you to say that there are no other syrups except chocolate or cocoa capable of holding the crystals of quinine sulphate in suspension?

A. No, I would not say that, but I would say that there is none that I know of which has the other advantages of chocolate in this preparation.

X Q. 188. These other advantages include, as I understood your direct testimony, a palatable taste?

A. That is one.

X Q. 189. This taste is calculated to make the product popular?

A. It helps.

X Q. 190. What therapeutic advantage has the chocolate or cocoa in this preparation, if any?

A. As regards the actual therapeutic action of quinine it has none, but as regards aiding in making a palatable preparation, it aids in bringing out the full therapeutic action of the quinine, which in some other mixtures might be retarded.

X Q. 191. In what other mixtures for example?

A. In a mixture where the appearance of the product was not appetizing or in a mixture that was not so acceptable to the stomach.

53 X Q. 192. What mixture, for example, would not be so acceptable to the stomach?

A. A mixture which was distasteful to the patient.

X Q. 193. Won't you be a little more specific and suggest some mixture that would be distasteful to the patient?

A. One with a flavor or taste, color or appearance which would be nauseating or objectionable to the patient.

X Q. 194. In the samples of preparations introduced as "Pfeiffer Experiment No. 1 and No. 2," I understand that there is no yerba santa in either?

A. No yerba santa in either of them?

X Q. 195. So far as pertains to quinine as masked in either preparation, the masking is effected then solely by the syrup used, that is in the one case by the "simple" syrup and in the other case by the chocolate syrup?

A. By the chocolate syrup, no other flavors or other ingredients of any kind. One is a mixture of a simple syrup and quinine

The other is a mixture of cocoa and quinine, with the same proportion of cocoa and same proportion of quinine as in Quin-Coco.

X Q. 196. The sample containing cocoa also contains a simple syrup, does it not?

A. Sugar is the base of the syrup of cocoa.

X Q. 197. Are there any other syrups than chocolate or cocoa having the advantages of making a liquid preparation opaque?

A. There might be. I know of none I could mention.

X Q. 198. How about maple or licorice?

A. Licorice, unless I am mistaken, is soluble and will give the preparation a dark color, while cocoa is insoluble and its effect on the preparation is different on account of this difference in character. Maple I have not had any experience with and do not know.

X Q. 199. Is it not common practice in the preparation of liquid medicines, to color them with simple coloring ingredients for
54 the purpose of making them opaque?

A. I never heard of an ingredient added to a liquid preparation for color only which was not soluble in the liquid preparation.

X Q. 200. You spoke of Quin-Coco being brought out by Pfeiffer Chemical Company in response to a demand for a preparation of this character. Will you explain more fully the nature of these demands?

A. They were requests we received from the trade for such a product.

X Q. 201. Did these requests come to you personally and if so from whom were they received?

A. They may have, but on account of the length of time since the product was marketed, I would be unable to state specifically.

X Q. 202. Do you remember of seeing any letters containing such requests?

A. I do not remember.

X Q. 203. Do you remember having any conversation with any of your traveling men on this subject?

A. I do not.

X Q. 204. You do not recall any statements made to you by any of your traveling men in reference to a demand in the trade for a preparation to sell in the place of the Eli Lilly & Company preparation, Coco-Quinine?

A. I do not. I might add that I personally keep a folder in which requests, verbal or written, for additions to our line, are filed. I go over this folder with the other members of the firm, also with our salesmen, and after the decision has been made, all the material is destroyed, so any requests or statements which have been received have long since been destroyed. I always talk over with our travelers when seeing them the question of new preparations. If the question of Quin-Coco was discussed, it was discussed with our travelers just as I discuss the advisability of marketing or adding other new
55 products. Sometimes when in doubt about adding a new preparation we submit the matter to our salesmen for a vote. Whether or not this was done with Quin-Coco I don't remember.

X Q. 205. Please state fully what was done in the fall of 1906 by the Pfeiffer Chemical Company in bringing out the preparation which you call Quin-Coco?

Mr. Rawle: That is objected to as not affecting the rights of this defendant.

The Witness: I would be unable to answer that question for the reason that at that time I was in Chicago in charge of the Searle & Hereth Laboratories.

X Q. 206. Who had charge of the work of bringing out this preparation for the Pfeiffer Chemical Company in the fall of 1906?

Mr. Rawle: The same objection is made.
The Witness: Being away from the laboratory I could not state.

X Q. 207. Was any of the preparation made and sold during the fall of 1906?
A. From personal knowledge I could not state.
X Q. 208. When was this preparation first considered in marketable form and placed upon the market by your concern?
Mr. Rawle: That is objected to unless it refers to the defendant.

The Witness: I think it was in the fall of 1906, but I am unable to state positively. It may have been a little prior to the fall or it may have been towards the latter part of the year.

X Q. 209. Was any considerable quantity of this preparation made either during 1906 or 1907 and sold by your concern?
A. I can only answer that by comparison, by stating that there was less sold then than we sell now.
56 X Q. 210. What concern first introduced to the trade a liquid preparation of quinine sulphate colored and flavored with cocoa?
A. My understanding is that the firm that first introduced it and detailed it in a large way was Eli Lilly and Company.
X Q. 211. The preparation which they marketed under the name of Coco-Quinine?
A. Yes.
X Q. 212. Was or was not the Eli Lilly & Company preparation one that was popular in the trade in 1906?
A. I would say that Coco-Quinine was known by the trade, but I could not say as to the extent of its popularity.
X Q. 213. Do I understand from your direct testimony that Quin-Coco is not manufactured in the Philadelphia laboratories of William R. Warner & Company?
A. Yes. That would require the explanation that the Searle & Hereth Company share with the William R. Warner & Company the building occupied by William R. Warner & Company.
X Q. 214. What is the relationship between the Searle & Hereth Company and the William R. Warner & Company?
A. William R. Warner & Company, is distributor for the products of the Searle & Hereth Company.

X Q. 215. What is the distinction as to the ownership between the two corporations?

A. The Searle & Hereth Company is a corporation of the State of Illinois. William R. Warner & Company is a corporation of the State of Pennsylvania.

X Q. 216. Are not both corporations owned by the identical persons?

A. They are not.

X Q. 217. In what respect do the ownerships differ?

A. William R. Warner, Jr., owns an interest, a substantial
57 interest, in William R. Warner & Company, and has no interest whatever in the firm of the Searle & Hereth Company.

X Q. 218. What is the relationship between the Pfeiffer Chemical Company and the Searle & Hereth Company on the one hand and William R. Warner & Company on the other?

A. The Pfeiffer Chemical Company is a corporation incorporated in the State of Missouri, the stockholders of which are different than either those of the Searle & Hereth Company or those of William R. Warner & Company.

X Q. 219. Is it not true that the controlling interest in each corporation is owned by the same individuals?

A. It is.

X Q. 220. Is it not true that Searle & Hereth Company except in name has no active existence, but the preparations sold under its labels are manufactured in the chemical laboratories of the Pfeiffer Chemical Company in St. Louis and the laboratories of William R. Warner & Company in Philadelphia?

A. No. The Searle & Hereth Company has a legal existence, makes its reports to the State, reports the income tax covering its profits to the national government and fanufactures its own products.

X Q. 221. But has no independent laboratories?

A. It has independent laboratories, just as much as William R. Warner & Company and the Pfeiffer Chemical Company.

X Q. 222. Where are the laboratories of the Searle & Hereth Company located?

A. St Louis, Missouri, and Philadelphia, Pa.

X Q. 223. What is the difference in the identity of the Searle & Hereth Company laboratories in Philadelphia and the laboratories of the William R. Warner & Company in Philadelphia?

A. They are in the same building?

X Q. 224. Are they not identical?

A. They are together.

58 X Q. 225. Is there any difference watever?

A. Yes. Each firm's products are made from each firm's formula, each preparation is made as an individual entity.

X Q. 226. Do not the same chemists and employees conduct the operations of the different concerns, the same laboratories?

A. Yes.

X Q. 227. Is not the same thing true of the laboratories in St. Louis?

A. Yes.

X Q. 228. Do you regard Quin-Coco as a Searle & Hereth formula?

A. Yes. It is so filed in our formula binders.

X Q. 229. When did you acquire the Searle & Hereth Company?

A. June, 1906.

X Q. 230. Did you find Quin-Coco formula among the Searle & Hereth formulas?

A. No, and there are other formulas now put out under the Searle & Hereth which were not in the Searle & Hereth formulas at that time, new products which we have added since 1906.

X Q. 231. May I inquire why the Searle & Hereth label is used for the Quin-Coco product instead of the label or the Preiffer Chemical Company, which I understand originally brought it out?

A. The reason was that when the Searle & Hereth Company affiliated with the Pfeiffer Chemical Company, the Pfeiffer Chemical Company had marketed a line of pharmaceuticals. As they also manufactured a line of patent medicines, it was difficult to introduce the goods and the line was not at all popular. After the affiliation, the Searle & Hereth line of pharmaceuticals being established, the Pfeiffer Chemical Company line of pharmaceuticals was discontinued, and the leading items in the Pfeiffer Chemical Company line were remarketed under the Searle & Hereth label. That was the reason Quin-Coco was transferred.

59 X Q. 232. You regarded your ownership of the Searle & Hereth Company as giving you the right and privilege of adopting the Searle & Hereth label for any product you saw fit; is that not so?

A. Yes.

X Q. 233. You considered this practice your privilege in order to utilize the good-will of the Searle & Hereth Company you had purchased to your best advantage?

A. Yes.

X Q. 234. Were Searle & Hereth originators of a combination of calomel and bismuth?

A. I could not say that they were the first firm to ever mix calomel and bismuth, but they marketed and made popular a special combination of these two ingredients under the name Calolactose.

X Q. 235. Is it not true that so-called specialties of many concerns in many instances are substantially well known formulas, marketed under special names and made popular by special effort?

A. That is probably true to a certain degree. How common that practice is I would be unable to state.

X Q. 236. Referring to the blue list, "Plaintiff's Exhibit Document No. 3," are not many of the items on this list common prescription items?

A. Many of the preparations are prescribed and many sold in original packages and some both.

X Q. 237. I note on this list that you give the original product, the original manufacturer and the original manufacturer's price

the prominent location on the circular. Was there any purpose in this?

A. That was necessity, because this information required more room inasmuch as it was unnecessary to state the manufacturer's name on our product.

X Q. 238. Why was it necessary to state the manufacturer's name and manufacturer's price as to the original product?

A. As a matter of information.

X Q. 239. You mentioned that your travelers use their
60 spare time, or some of it, in detailing special products to the physicians. Can you give any estimate as to the proportion of your travelers' time that can be so classified?

A. I would saw a small proportion of their time.

X Q. 240. What specialties do they detail?

A. That depends upon the traveler. Some travelers take a liking to one product and push that product. Others take a liking to a different product.

X Q. 241. The traveler is allowed to use his own judgment then?

A. Very largely. It is only done in his spare time and we feel he is the best judge of his territory, and the work so done is entirely voluntary on his part. It is not a requirement from the firm.

X Q. 242. What have you to say of your product Quinimel as a medium for masking the taste of quinine sulphate?

A. It is a good product. It is weak in that it does not hold the quinine in suspension. The quinine precipitates on standing.

X Q. 243. That is used more for extemporaneous combining, I presume; I mean for immediate administration?

A. Yes. The Quinimel is intended as a medium for extemporaneous preparation and for masking the taste of other bitter substances other than quinine also. Quinimel is a vehicle only, containing no quinine or other drug with definite therapeutic action.

X Q. 244. Your statement as to the value of your sales of Quin-Coco for the year 1914 I assume was made after inspection of your sales records and is as accurate as you can make it?

A. We do not keep a statistical record of Quin-Coco sales. This is based upon the laboratory records as to the amount made.

X Q. 245. What do your laboratory records as to the amount made show in gallons?

A. I could not state.

61 X Q. 246. Your laboratory records would show this, I presume?

A. Yes, with the explanation that we marketed this same product under another name, in proprietary formula, under the firm name of Preiffer Chemical Company, under the name of Dr. Hobson's Sweet Chocolate Quinine, and it would be impossible to state how much was marketed under the name of Quin-Coco, and how much under the name of Dr. Hobson's Sweet Chocolate Quinine.

X Q. 247. Do your figures refer to the product of St. Louis laboratories alone or the St. Louis laboratories combined with the Philadelphia laboratories?

A. Combined.

X Q. 248. How long has the preparation been on the market under the Dr. Hobson's label?

A. Several years. I could not state exactly how many.

X Q. 249. Do you keep a record sales of the Dr. Hobson's product?

A. We do not.

X Q. 250. In your testimony Wednesday, relative to your instructions to salesmen, you referred to a typewritten memorandum for the purpose of refreshing your memory. When was this typewritten memorandum prepared?

A. That memorandum was an evolution of points I had been taking up with the salesmen, this being the last list, and as near as I can remember, this was first adopted in the early part of 1914.

X Q. 251. Do physicians as a rule specify the make when prescribing items which are commonly referred to as "general line" items; I think you have used the term "general lines"; is not that correct?

A. I am really not any longer competent to testify as to present practice, but I feel the practice varies. Some do and some do not. Some consider, if it is a line item, any maker's product would be satisfactory. Others have a preference for a certain maker's
62 line, and specify. The various houses aim to encourage specification for their particular products.

X Q. 252. You have mentioned I think that propably one-third of the jobbers in the United States had sent you orders for this item, Quin-Coco. Can you state approximately the proportion of your sales of this one item that goes through the jobber's hands?

A. I could not say, but I would say a small proportion.

X Q. 253. One per cent?

A. I would say more than that as an opinion.

X Q. 254. You mentioned the fact that your house does not advertise in the medical journals. Is there any reason for this?

A. Our house formerly quite largely advertised in the medical journals. We discontinued doing so because we thought it did not pay.

X Q. 255. By "our house" do you mean William R. Warner & Company or Pfeiffer Chemical Company, or both?

A. William R. Warner & Company.

X Q. 256. Does the Pfeiffer Chemical Company advertise in the medical journals?

A. Never, to my knowledge.

X Q. 257. Have you ever advertised Quin-Coco in the medical journals?

A. Never, to my knowledge.

Redirect examination.

Mr. Rawle: I re-examine without waiving any objections.

By Mr. Rawle:

R. D. Q. 258. Referring to the typewritten pages you used yesterday to refresh your memory, about teaching your salesmen, you say

it is an evolution. How far back does it go in substance, that is how far back did you teach your salesmen along the lines indicated on these typewritten sheets?

63 A. This vest pocket memorandum which I have had over eight years was the beginning of making notes for conferring with the travelers.

R. D. Q. 259. And that has been gradually enlarged into the typewritten sheets?

A. It has.

R. D. Q. 260. How far has the teaching been the same, independently of whether you used that vest pocket book or the typewritten sheets?

A. The general policy has been the same.

R. D. Q. 261. As a matter of fact, is not the business of these affiliated corporations carried on entirely by yourself, your brother, Mr. H. Pfeiffer, both living in Philadelphia, and Mr. G. D. Merner, living in St. Louis?

A. We three have personal charge and control of the business of the several concerns.

R. D. Q. 262. What does "detailing" mean in respect of selling drugs to physicians, and is the term applied to dispensing doctors?

A. Detailing as commonly understood means demonstrating either by literature, samples, or personal visit to the physician. Detailing is done both to the prescribing and dispensing physician. It may also be done in a limited way to the druggist.

R. D. Q. 263. State whether or not it is usual and proper that salesmen selling competing goods should be informed as to competitor's prices for his goods?

A. This to a greater or less degree is almost necessary in order to meet the arguments of the buyer.

R. D. Q. 264. In this case chocolate and cocoa have often been used more or less interchangeably. State whether or not in current talk among laymen and even among those in the drug business, they are often used interchangeably, though not accurately?

A. They are.

R. D. Q. 265. When you became connected with William R. Warner & Company in 1908, was that corporation represented in the Homilia Club and by whom?

A. It was, by Mr. Frank M. Ramsay. Shortly after my

64 connection with William R. Warner & Company, Mr. Ramsay's services were discontinued, and I understand his membership in the Homilia Club was dropped or lapsed.

R. D. Q. 266. Soon afterward you were elected?

A. Later I was elected as a member.

R. D. Q. 267. While the membership of the club consisted of individuals and not of the corporation, they were employed by, and were in the club as representatives for their respective houses?

A. That was my understanding.

R. D. Q. 268. Do you happen to know whether Mr. Joshua K. Lilly was the Registrar of the club?

A. Yes, he was, at least for a time. I am informed that the Homi-

lia list, second issue, in evidence, was published at the offices and under the supervision of Mr. J. K. Lilly.

By Mr. Bradford:

R. D. Q. 26-. As Registrar of the club?
A. As Registrar of the Homilia Club.

By Mr. Rawle:

R. D. Q. 270. In the drug manufacturing business, state whether or not there is any more or less common practice of calling the attention of a competitor to trade derelictions on the part of one or more of that competitor's salesmen.

Mr. Bradford: Objected to as not re-direct examination, immaterial and irrelevant.

The Witness: It is done. How common the practice is I am unable to state.

R. D. Q. 271. Will you state whether or not anyone representing the Lilly Company ever complained to the defendant in respect to the matters here in controversy, as to an unfair method of selling Quin-Coco?

A. I have no recollection of ever receiving a letter or a complaint from Eli Lilly & Company regarding the acts or methods of
65 any one of our salesmen. I do remember of our St. Louis office at one time complaining to Eli Lilly & Company regarding the acts of one of their travelers, and my recollection is that the matter was amiably adjusted.

R. D. Q. 272. State whether or not in your opinion Quin-Coco S. & H. is inferior to the Lilly product of Coco-Quinine in stability or other qualities?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: We consider it equal in therapeutic action and a superior product from a pharmaceutical standpoint.

R. D. Q. 273. You have been asked whether you advertise your products and you replied that you did not. Can you state whether or not, for this reason, and for any other reason, the cost of selling goods for your house is lower than that of competitors?

Objected to by Mr. Bradford as not re-direct examination.

The Witness: Not knowing the cost of selling of other firms, I do not know whether our cost of selling is less or more, but not spending any money in advertising in the medical journals, it is not necessary to add this to our selling cost. The selling cost as I use the term here includes both advertising and salesmen's expenses and other expenses for exploiting products.

R. D. Q. 273. Has it been your practice to employ head salesmen or salesmen having some supervision over the travelers?

A. Yes.

R. D. Q. 274. To what extent have such head salesmen had to do with the teaching travelers the proper method of selling goods?

A. To the extent of following our instructions as regards our policies and as regards posting the men on the various products.

66 R. D. Q. 275. And as to trade morals and as to morals of selling the goods?

A. Yes, that is part of our instructions.

R. D. Q. 276. State how far your instructions to your head salesmen were along the same lines as those to your travelers that you have testified to?

A. I often reviewed this list with the head travelers.

Recross-examination.

By Mr. Bradford, without waiving objections, as follows:

R. X Q. 278. As I understand it now, in addition to yourself, a "head salesman" taught your traveling men how to sell goods. Will you please explain a little more fully the methods employed by these head salesmen in teaching the travelers, I mean were their instructions wholly in the office or were these head salesmen put upon the road with the travelers and by example as well as by instruction authorized to teach your travelers?

A. The head salesmen worked with the regular salesmen both in the office and on the road. They sold goods with the regular traveler, often doing the selling themselves, leaving the regular salesmen watch their work, and then this would be reversed and the head salesmen would watch the regular salesmen work.

R. X Q. 279. Besides yourself, who else gave instructions to the head salesmen and also to the regular travelers?

A. Mr. Henry Pfeiffer, Philadelphia, Mr. G. D. Merner, St. Louis.

R. X Q. 280. Did these gentlemen also accompany salesmen on their trips?

A. Mr. Henry Pfeiffer years ago did this work. I don't remember of Mr. Merner ever working with the regular salesmen himself.

R. X Q. 281. Is it not a fact that Quin-Coco is as close a duplicate to Coco-Quinine as it is possible for your laboratories to make it?

67 A. We add nothing to Quin-Coco to make it like Coco-Quinine. Quin-Coco is the result of the ingredients all of which are necessary to the making of the product.

R. X Q. 282. By "the product" I assume you mean a product both in appearance and therapeutic action like Quin-Coco?

A. By "product" I mean Quin-Coco itself.

R. X Q. 283. Is not "detailing" usually considered important in the introduction of the new specialties?

A. Formerly it was considered the only method, but at present far less detailing is done. It is an efficient method of introducing a new product. However, the expense of personal detailing is so high as to, in many cases, make it unprofitable. I would say the practice of personal detailing with samples has diminished a great deal in recent years.

Mr. Rawle: Having just been able to procure copies of the third and fourth "Issues" of the registration list of the Homilia Club, following in sequence the second issue of the same club list offered in evidence yesterday, I now offer these two issues in evidence in respect of the registration therein of Coco-Quinine by Eli Lilly & Company in Class A and of "The Lilly Print" on the back of the cover, as indicating the printer of these two issues.

Mr. Bradford: The introduction of these lists is objected to except as a whole and for all the information they contain. If offered as exhibits as a whole for the information of the court no objection to their introduction is made, and it is admitted that they were published by the Registrar of the Homilia Club, Mr. J. K. Lilly, the President of the complainant corporation, and at complainant's publishing department.

The issues referred to are marked by the stenographer,
68 Defendant's Exhibit, Homilia Registration, numbers 2 and 3 respectively. GUSTAVUS A. PFEIFFER.

Deposition closed.

HENRY PFEIFFER, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. Please state your name, age, residence and occupation?

A. Henry Pfeiffer; age, 58 years old; residence, 6809 York Road, Philadelphia; occupation, manufacturing pharmaceuticals and patent medicines.

Q. 2. Have you ever been in the retail drug business; and if so, where, and how long?

A. I was in the retail drug business in Cedar Falls, Iowa, and for ten years about.

Q. 3. And after that?

A. After that went into the drug manufacturing business in St. Louis, in the firm of Allan Pfeiffer Chemical Company, nine years; then with the Pfeiffer Chemical Company and Searle & Hereth and William R. Warner. I am the President of William R. Warner & Company.

Q. 4. I understand that the business is controlled and managed by you and your brother, G. A. Pfeiffer and G. D. Merner entirely?

A. Yes.

Q. 5. What is your general department of the work, broadly speak*nig*?

A. I devote the most of my energy and time to the selling end, engaging salesmen, and training them, also in the financial and business ends.

Q. 6. Do you have considerable to do with training the travelers when they are first taken on?

69 A. Yes.

Q. 7. Also you have been absent in the last five or six years going around the world and traveling more or less, have you not?

A. I have been away from the business about the last five years, from one-half to two-thirds of my time.

Q. 8. What is your method of preparing the travelers to go out on the road and what line of instruction do you give them?

A. We give them samples and catalogues, "Salesmen's Confidential" and verbal instructions.

Q. 9. Have you any written rules which you impress upon them and have done so for some years; if so produce them?

A. I have a vest pocket memorandum which I have had for 13 or 14 years, this same book (producing memorandum book).

Q. 10. Have you taught the new travelers from that?

A. I have taken this up with them after they had been with us some time, after they had started out. I did not take this up with them at the time they started so much as I did after they were with us.

Q. 11. What rules or directions do you find in that vest pocket book, bearing on the question of how to deal with competitors' like products?

Mr. Bradford: Objected to unless the book is to be introduced as a whole.

Q. 12. Using this vest pocket book merely to refresh your memory, state what, if any, teaching you gave the travelers as to how to deal with competitors, as to talking about competitors' products?

A. Always taught them to let the other fellow alone, that we had all we could do to handle our own business.

Q. 13. Who do you mean by "the other fellow?"

A. The other competitors.

Q. 14. What do you mean by "letting alone?"

A. I mean not to waste their time talking about competi-
70 tors, but to put their entire efforts and energies on our samples, on our line that we manufacture and sell them.

Q. 15. How do you teach them with regard to a careful observance of trade morals and honesty in traveling for your house?

A. We always felt that our line gave us great possibilities, and if we got what we were entitled to we would be satisfied. It was not necessary to lie or misrepresent to get that business.

Q. 16. Did you take up with them the rules in the "Salesmen's Confidential" and discuss those?

A. Yes.

Q. 17. I hand you a copy of "Salesmen's Confidential and Manual," 1913–14, and call your attention to the 86th and 87th pages thereof. On page 86, notice rules 16 and 17, and on page 87 the seven rules indicating "Our Policy in Dealing with the Trade." Please look at those rules and state how far you took up those subjects in teaching your salesmen?

A. We constantly made an effort to keep our salesmen from talking too much about our competitors. We felt it was in our own line, that every knock was a boost, for the other fellow. That has been our policy, to keep from mentioning or recognizing the other people in our selling talk.

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Cross-examination, without waiving objections:

Mr. Bradford, without waiving objections, cross-examines as follows:

By Mr. Bradford:

X Q. 60. The several gentlemen to whom counsel has referred to in his direct examination as witnesses on behalf of the plaintiff in this case, are all well-known to you, are they?

A. I know them very well.

X Q. 61. Are they men of good reputation?

A. That I don't know, except Mr. Richard. He is all right, I know that; also Mr. Ames. I don't know about the others, I would not say.

X Q. 62. You would have confidence in anything that Mr. Richard or Mr. Ames told you, would you?

A. Yes, sir.

X Q. 63. As to Mr. Noiret you would not be willing to make the same statement?

216 A. Well, I don't know him as well as I do the others.

X Q. 64. How long have you known Mr. Noiret?

A. I met him, but I haven't known him to amount to anything. I only met him on the road. I didn't run with Mr. Noiret. He and I were a different strain. We didn't run together, you know.

X Q. 65. Is it a fact you frequently met on your trips?

A. We didn't frequently meet; no, sir. We met once in a while, but we didn't meet frequently.

X Q. 66. How long did you travel together in the same territory for your respective houses?

A. I don't think he was in my territory over a year. He was on the road, but not in my territory.

X Q. 67. You spoke of various calls for which the druggist might rightfully dispense Quin-Coco. Among them you mentioned sweet quinine?

A. Yes, sir.

X Q. 68. What is the technical name of the preparation commonly known in the drug trade as sweet quinine?

A. I don't know.

X Q. 69. Did you ever hear of Febriline?

A. Yes, sir.

X Q. 70. Isn't Febriline frequently called sweet quinine by druggists?

A. The people call it sweet quinine. They don't know the difference between them. They call it sweet quinine.

X Q. 71. What is the difference between Febriline and sweet quinine?

A. One is made with sulphate and the other is made of cinchona alkaloid.

X Q. 72. Has Febriline any chocolate in it?

A. No, sir; not that I know of.

X Q. 73. When did you first hear of a liquid quinine preparation colored and flavored with chocolate?

217 A. Well, I can't state the exact date I first heard of it.

X Q. 74. About when?

A. The first preparation of it I saw I think it was chocolate quinine tablets.

X Q. 75. When was that?

A. That was quite a while ago. I don't know the exact date.

X Q. 76. When did you first hear of it?

A. I can't tell you the exact date when I did first hear of it.

X Q. 77. Did you ever hear of Eli Lilly & Company's Coco-Quinine?

A. Certainly.

X Q. 78. Did you ever hear of any liquid quinine colored and flavored with chocolate before you heard of Coco-Quinine, Lilly?

A. No, sir; I saw preparations of it made by retail druggists.

X Q. 79. Where?

A. In New Orleans.

X Q. 80. When?

A. That was in 1893.

X Q. 81. What did you see?

A. I saw chocolate lozenges, tasteless, made by J. T. Baltar, of New Orleans.

X Q. 82. Are chocolate lozenges liquid?

A. No, lozenges.

X Q. 83. My question asked you as to liquid preparations?

A. Liquid—no, sir.

X Q. 84. You speak of dispensing preparations in two-ounce bottles under what name?

A. Quin-Coco. They sell it that way. They sell it over the counter as Quin-Coco.

X Q. 85. Where?

A. In retail drug stores we sell it to.

X Q. 86. Put up in original packages as Quin-Coco?

218 A. Yes, sir.

X Q. 87. How long have you been doing this?

A. Since we have been handling it.

X Q. 88. And the druggists are handling these original packages of Quin-Coco in two-ounce bottles?

A. There is quite a number of them in my territory.

X Q. 89. Name some of them?

A. The Owl Drug Company, Vinegar Bend, Ala, The People's Drug Store in Leeksville, Mississippi, The Wallace Drug Store, Laurel; E. E. Perkins, Sandersville, Mississippi; Lafayette Drug Store of Lafayette, Louisiana; Davis Pharmacy, of Bunker, Louisiana; and quite a number of others.

X Q. 90. And these several stores have been handling it?

A. In the original package, sell it right over the counter.

X Q. 91. Ever since it was put on the market?

A. Yes, sir.

X Q. 92. You have referred to counter prescriptions?

A. Counter prescribing.

X Q. 93. This is by the druggist himself, I assume?

A. Yes, sir.

X Q. 94. You say that as a salesman for your present employers you have never represented to a retail druggist that he could use any of your products to replace the products of competitors when the competitors' product was asked for?

A. I have never told a man that he could substitute, never. That is not my policy. I talk my preparations to the druggist. I show him their quality, and everything of that sort, but I never told a man to substitute; if you get a prescription for this and that and the other specified, give it to them.

X Q. 95. Did you ever compare your product Quin-Coco with the Lilly product, Coco-Quinine?

A. Never did.

219 X Q. 96. Never mentioned Coco-Quinine?

A. I don't know that I never mentioned it, but I never compared it.

X Q. 97. What do you say in reference to Coco-Quinine when making your sales of Quin-Coco?

A. I never call it Quin-Coco. I call it Chocolate Quinine.

X Q. 98. What would you say as to the character of these numerous witnesses who have testified that you mentioned Coco-Quinine to them and told them that Quin-Coco was the same thing?

A. I didn't tell them that.

X Q. 99. What have you to say as to the character of the men who would make such statement?

Mr. Rawle: Objected to as irrelevant and futile.

A. Well, I have nothing to say as to their character.

X Q. 100. I suppose if every druggist in your territory would testify to the contrary, you would still insist that your statement last made is true?

A. Yes, sir; I simply would; absolutely.

X Q. 101. Is Quin-Coco one of your leading sellers in your territory?

A. No, sir.

X Q. 102. You don't regard it as of much importance in your line, do you?

A. No, sir; not so very much.

X Q. 103. You sell a good deal of it, however, don't you?

A. I don't sell an extra amount of it. I sell it once in a while. I sell more Guaiatonic, Tritica and specialties and things like that. We are always working for the profitable side of it, and we always work those first.

X Q. 104. You mean there is more profit in these others than there is in Quin-Coco?

A. Many of them there are.

X Q. 105. From whom did you get this information?

220 A. From my own self, my own experience. I don't reckon there is a man traveling that don't know the profitable ones in his line.

X Q. 106. You mean the profit to yourself or to your house?

A. To my house.

X Q. 107. You personally have knowledge of what these various products profit your house?

A. I have an approximate idea of these things, you know.

X Q. 108. You must have obtained that idea from some one who knows?

A. I have been in the drug business all my life and I know about what things are, you know. I never had any specific information from the house as to those things.

X Q. 109. You know the cost of Quin-Coco by the gallon?

A. No, sir.

X Q. 110. You know the cost of Guaiatonic by the gallon?

A. No, sir.

X Q. 111. You know the cost of Tritica per gallon?

A. No, sir.

X Q. 112. In what special localities did you have the largest demand for Quin-Coco?

A. No special locality, I don't think. I work all together in the South, you know, and it is more or less used in the South, and I have no big sale on it.

X Q. 113. How did you introduce Quin-Coco to your customers when it first came on the market?

A. I took the preparation and showed it to them and explained it to them and told them it was a preparation without grease, it would not separate, it would not ferment, it would not nauseate the stomach. I told them there was a growing complaint of chocolate-quinine on the market, they would get lumpy; ours was always the same consistency. I got out in that way and got what I did get in that way.

221 X Q. 114. How many chocolate quinines were there on the market when you introduced Quin-Coco?

A. There were three or four in my territory; I think there were three or four.

X Q. 115. Name them?

A. I know there was Mulford's and Harvey's. I don't know the others. There was three or four in that territory; and Lilly's.

X Q. 116. When did you begin the sale of Quin-Coco to your trade?

A. I don't know the exact date.

X Q. 117. About when?

Q. When we brought it out on the market; I don't know the exact date of that.

X Q. 118. Approximately how many years?

A. Ten, I reckon; eight or ten.

X Q. 119. Would you say it was as much as eight?

A. No, I would not swear to that.

X Q. 120. Would you say it was more than seven?

A. I guess it was seven or eight; I couldn't say the exact date, you know.

X Q. 121. Who first instructed you in reference to this product of Quin-Coco?

A. I had no regular instructions about it at all. I got it like any preparation that is sent to us, with literature, you know. There was no special instructions about Quin-Coco.

X Q. 122. The product was merely added to your line and you were expected to sell it?

A. That is the way we did with all the line.

X Q. 123. Did you ever have any instructions at the home office in reference to the preparation?

A. No, sir; only in a circular way. They sent out a circular about Quin-Coco, literature or something of that sort.

X Q. 124. Did you ever talk to any one in the laboratory about it?

A. Yes, sir—not about Quin-Coco though. I talked with the chemist in the laboratory.

222 X Q. 125. About other things?

A. Well, I have been up there to see him. Every time I come in the house I go to speak to him.

X Q. 126. Isn't it your custom to talk to him about the preparations?

A. The preparations I want to talk to him about, yes, sir, but I had no preparations to talk to him about Quin-Coco, though.

X Q. 127. Did you ever talk to him about its similarity to Coco-Quinine?

A. No, sir; never did.

X Q. 128. He never said anything to you about its similarity to Coco-Quinine?

A. No, I don't think Coco-Quinine was mentioned in my presence.

X Q. 129. Did you ever hear Quin-Coco mentioned among the Pfeiffer sales force that Coco-Quinine was not mentioned in connection with it?

A. How is that?

X Q. 130. Did you ever hear Quin-Coco discussed among the Pfeiffer salesmen or any one connected with the Pfeiffer or Warner houses at any time?

A. Yes, I heard that mentioned a number of times, but I didn't hear a word about Coco-Quinine at all.

X Q. 131. What other druggists did Mr. Ritayik call on in your company on the same trip that you called on Mr. Heno?

A. While we were in Napoleonville we called on Mr. Heno and called on the Ruby Drug Store, and we called on Roth Drug Company—that day, you mean?

X Q. 132. Where?

A. At Thibedeau, Louisiana. We called on Roth Drug Store, same place and Meyer Drug Store.

X Q. 133. Does this cover the entire trip or merely that day?

A. That day.

X Q. 134. How many days was Mr. Ritayik with you?
A. Two days.
223 X Q. 135. Where were you the other day?
A. Working on the Bayou la Fourchee.
X Q. 136. What drug stores did you call on that day?
A. We called at a general store selling patent medicines.
X Q. 137. Perfumes?
A. No, patent medicines. We didn't sell any perfumes.
X Q. 138. Did you say you never sold Mr. Ames any pharmaceuticals at any or either of his stores?
A. No, I said I didn't sell Mr. Ames at Laurel.
X Q. 139. Have you sold him any at Hattiesburg?
A. We sold him since he made that testimony there. I sold him two pharmaceuticals before this. I sold him Calalactose and Pancreopepsine, and then we sold him a nice bill since then about three or four weeks ago.
X Q. 140. Prior to the time when Mr. Ames testified had you not solicited his trade for pharmaceuticals?
A. Yes, sir.
X Q. 141. In selling your entire line, as you have referred to it, I suppose you mean you go over each of these three thousand items with your customer, do you?
A. We have a big book that has everything in it. I start on the first page and go over each thing.
X Q. 142. Calling his attention to the leaders?
A. Everything in there.
X Q. 143. How long do you spend in each retail drug store?
A. Sometimes two hours, sometimes thirty, forty minutes. Sometimes I go fast with it, and that is our policy, to go through it.
X Q. 144. You mean you can talk three thousand items to a man in an hour, thirty minutes or forty minutes?
A. Your label is there and your cartons are labeled of what you are selling or the label of the pharmaceutical is in there. You go right through it. If there is something that strikes his eye or we have a specialty, we call his attention to it. We go right
224 along. With some I do and some I don't. We go through the whole line. That is our policy with every man we call on.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 145. You referred to chocolate lozenges made by J. T. Baltar of New Orleans in 1893. Did you state whether or not you handled that as a retail druggist?
A. No, sir; he handled it.

Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

R. D. Q. 146. State whether or not you were familiar with that product of Baltar's?

Mr. Bradford: Same objection.

A. Yes, sir, I was. I. L. Lyons & Company, of New Orleans, sold it for them in a wholesale way. Baltar made it.

R. D. Q. 147. What had you to do with it, please?

Mr. Bradford: Same objection.

A. Nothing whatever.

R. D. Q. 148. What knowledge had you of it?

Mr. Bradford: Same objection.

A. Well, I was there in contact with it and saw it.

R. D. Q. 149. In what connection were you in contact with these lozenges?

Mr. Bradford: Same objection.

A. I was working for I. L. Lyons & Company.

R. D. Q. 150. And I. L. Lyons & Company sold it?

Mr. Bradford: Same objection.

A. Yes, sir.

R. D. Q. 151. Did you sell it?

Mr. Bradford: Same objection.

225 A. No, I didn't sell it. I was working in the house. I filled the orders for it.

R. D. Q. 152. What was the name of the preparation?

Mr. Bradford: Same objection.

A. Chocolate lozenges.

R. D. Q. 153. State whether or not it contained quinine?

Mr. Bradford: Same objection.

A. He said quinine and chocolate.

R. D. Q. 160. What did the package say about it?

Mr. Bradford: Same objection.

A. I don't remember.

Re-direct-examination closed.

Deposition closed. B. F. JONES.

Sworn to before me the 7th day of December, 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court, Eastern Division of the Eastern Judicial District of Missouri.

Adjourned to meet at Planters' Hotel, St. Louis, Missouri, at 2.30 p. m. this day.

Pursuant to recess as before stated at 2.30 p. m. of the same day, the further taking of these depositions was resumed as follows:

HOWARD HENRY RICHARDS, a witness of lawful age, being produced on behalf of defendant, deposes and says:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and present occupation?

A. Howard Henry Richards; thirty-eight; I make my
226 headquarters at Houston, Texas; traveling salesman.

Q. 2. With William R. Warner & Company?

A. Yes.

Q. 3. State consecutively what you have done since you became connected with the retail drug business?

A. I was clerk in a retail drug store in Kansas City, that is twenty-four years ago, and following that I worked for Parke-Davis & Company for a period of four years; that is in the house, the Kansas City branch; and following that I went to work for the Searle & Hereth Company, that followed the four years I was connected with Parke-Davis & Company. I have been with Searle & Hereth and this concern practically sixteen years. I was with Searle & Hereth practically eight years and five years with the Pfeiffer Chemical Company, and with William R. Warner & Company the rest of the time.

Q. 4. Are you a registered pharmacist?

A. Yes.

Q. 5. How many years' experience?

A. Well, I served four years in the retail drug business as a clerk. I served three years, and then I took my course in the Kansas City College of Pharmacy, and afterwards registered.

Q. 6. Have you ever served as assistant sales manager for William R. Warner & Company?

A. Yes.

Q. 7. What years?

A. That was about three years I served in that capacity.

Q. 8. As traveling salesman what has been your territory?

A. My first territory was Kansas City, in the pharmaceutical department only, and later in northern Kansas, and after that I was
227 placed in the position of assistant sales manager. This covered a period of three years. At the expiration of that time, I was sent in their interests to southern California, headquarters at Los Angeles. I served the company there two years, and from the Los Angeles territory was transferred to southern Texas territory, headquarters at Houston, the territory I now cover, south Texas, includes San Antonio, Austin, Houston, Beaumont, Galveston and Brownesville.

Q. 9. How many drug stores, approximately, are there in your territory?

A. I would say in the neighborhood of fourteen or fifteen hundred drug stores.

Q. 10. How often do you visit them during the year?

A. Well, some of them I call on every sixty to ninety days, some twice a year.

Q. 11. What do they average all around?

A. I do not quite understand.

Q. 12. What is the average number of times you call on your entire trade during the year?

A. Well, I would say in the largest centers I make it on an average of five to six times a year, and smaller points I would say from four down as low as twice a year.

Q. 13. What proportion of the dispensing doctors do you call on?

A. I have but very few dispensing doctors in my territory. There are some, but they are mostly situated out in the isolated districts.

Q. 14. In selling, do you endeavor to sell the entire line?

A. Yes, always.

Q. 15. Do you specialize any particular item in your line?

A. No, sir.

Q. 16. In selling Quin-Coco, what is your practice in talking to the druggists?

A. Well, I sell Quin-Coco the same as any other product on our list.

228 Q. 17. Describe your method of taking up the subject, what is your sales talk?

A. My sales talk in demonstrating Quin-Coco in connection with the sale of any other product in our line, demonstrating Quin-Coco I merely call attention to the product as being the very best product of this character on the market, barring none, in smoothness, and the fact of it being free from any lumps, and the absence of any nauseating properties which is a serious drawback to some, and from the fact that it is palatable and it is sold at a reasonable price.

Q. 18. In selling a preparation against a competing preparation, what is your practice as to referring to your competitors?

A. Well, as a rule, I make no reference whatever to a competitor in selling an article. I sell Quin-Coco on its merits. The druggist is acquainted with the objectionable features, and with various pharmaceutical products, their experience is sufficient really to cover that which they buy.

Q. 19. Among what customers is there a market for Quin-Coco, and on what calls?

A. Well, you take the South, it is a large quinine consuming country, more so than any other section of the United States, and for the preparations of quinine, it is a matter of how to put it up in a form that is acceptable and palatable; take children, for instance. It is difficult for a child to swallow a quinine capsule, or even swallow a pill, and to put it in palatable form, syrup form, the drug trade generally are acquainted with the fact that a quinine preparation in tasteless form, of syrup consistency, makes a ready seller.

Q. 20. On what calls do druggists dispense it?

A. To reduce fever, and as a malarial tonic, and oftentimes, where you take it in the South, poor people cannot afford the serv-

ices of a physician, they are filled up with malaria and if they have twenty-five cents to spend, they go in and buy something
229 along that line, perhaps they cannot pay fifty cents for a chill tonic, they ask for something for malaria, and the first thought of a druggist is some palatable preparation, and for the unspecified call the druggist is at liberty to sell him Quin-Coco. I urge him to recommend along that line and sell him Quin-Coco, even in two ounce bottles, four ounce bottles, labeled with reading matter on it, so they can read what it is good for.

Q. 21. State whether or not these two and four ounce bottles of Quin-Coco are put up by all the houses?

A. Put up by our company as well as our packages sold over the counter.

Q. 22. In the original package?

A. In the original package.

Q. 23. Can you name any other calls upon which Quin-Coco could be supplied?

A. Well, it could be sold wherever quinine is i-dicated. Quinine in the South is just like fresh air in the North; it is a vitalizer.

Q. 24. Do you know any other calls that come into a drug store, that is in the nature for a call for sweet quinine or syrup of quinine?

A. There are various preparations of that kind on the market.

Q. 25. What I want to ask is, whether there are calls for anything like a sweet syrup of quinine?

Mr. Bradford: I object to the question as leading.

A. There are calls for tasteless syrups of quinine, bitterless quinine syrups, brown syrup of quinine, chocolate-quinine, and two-bit chill tonics.

Q. 26. In your experience as a retail druggist and salesman, is it within the power of the retail druggist, if he chooses, by special effort, to push the sale of a given preparation?

Mr. Bradford: I object to the question as immaterial, incompetent and irrelevant.

230 A. In the matter of selling goods, where there is no specific specification and a call is for a tasteless syrup of quinine or something to be suggested by the druggist for malaria or chills, it is optional with the druggist what he sells. It depends altogether on the percentage of profit that it yields him, which permits him to make the sale.

Q. 27. How far, if he chooses, can he create a market for a given product by a special effort?

Same objection.

A. Well, it depends altogether on the existing demand.

Q. 28. Along that line, with what chocolate-quinine preparation are you in competition in your territory?

A. In competition with several. Coco-Quinine for one; Ko-Quin, made by John T. Milliken Company, St. Louis. Those are two of

the principal ones. There is another product that is called Quin-Coco-ine that I see occasionally, manufactured by the Harvey Company and other various syrups of quinine, for instance, an alkaloidal preparation made by the Paris Medicine Company, called Febriline, and other syrups of tasteless quinine.

Q. 29. I wish you would again mention them all?

A. I would also say sweet preparations, preparations called syrups, Cinchona, alkaloids.

Q. 30. Which preparations mentioned contain quinine, I mean contain cocoa or chocolate?

A. The preparations that contain chocolate are those with the label of "Ko-Quin," made by John T. Milliken Company, and the preparation called "Quin-Coco-ine, made by the Harvey Company, and the preparation made by Eli Lilly & Company, known as Coco-Quinine.

Q. 31. If a retail druggist has a call for a specific make of a given preparation, and dispenses the make of another maker, state whether or not you consider that honest in a druggist?

231 A. I would not consider it so. If he would deliberately and knowingly dispense an article when another is called for specifically; I would not think he would dare.

Q. 32. Have you ever had personal and actual knowledge of such an act on the part of a druggist?

A. I have never seen it done.

Q. 33. If a salesman suggests to a retail druggist that a retail druggist can buy his preparation and dispense it when a similar preparation of another maker was called for, state whether or not you would consider that honest on the part of the salesman?

A. I would not consider it so.

Q. 34. Have you ever had personal knowledge of a druggist dispensing Quin-Coco, Searle & Hereth, when Coco-Quinine was called for on a prescription or over the counter?

A. I have never seen it done.

Q. 35. State whether or not you have ever made a suggestion to that effect to any retail druggist?

A. Never since I have been selling drugs.

Q. 36. State wh-ther or not you ever traveled with J. W. Wilkins, a Warner & Company salesman, when you were assistant sales manager for the company?

A. Yes.

Q. 37. State whether or not this was in the course of your duties as to instructing him as to the proper manner of selling drugs for the defendant?

A. I started him out in the interests of the company; traveled with him the first week he traveled for the company.

Q. 38. Did he have a "Salesman Confidential?"

A. Yes. He was equipped with a full set of catalogues, a sample case, complete outfit.

Q. 39. Including the "Confidential?"

A. Including the "Confidential," the price current complete.

Q. 40. When you were teaching him, state whether or not
232 you took up with him the policies of the house as to the proper method of selling its products?

A. I outlined in detail the general selling policy of the company and their wishes.

Q. 41. State whether or not you called his attention to any rules bearing upon honesty in the "Confidential?"

A. I outlined the general policy which is an open proposition with every salesman connected with the selling force of the William R. Warner Company and the Pfeiffer Chemical Company.

Q. 42. Tell what policy you taught him in that respect?

A. A complete demonstration of our entire line, not to speak ill of any competitor, put in six full days each week, and to not pass through a town where there is a drug store without soliciting orders from either the druggist or dispensing doctor and hospitals as well.

Q. 43. State whether or not you gave him any instructions as to what you considered honestly in his work?

A. To not misrepresent anything that we made.

Q. 44. State whether or not you gave him any instructions as to selling goods which are in competition with like goods of other makers?

A. I demonstrated the entire line with Mr. Wilkins just in a general way. Mr. Wilkins is a druggist and was thoroughly posted on a great many items, having sold them in a retail store.

Q. 45. Is there any rule in the "Confidential" particularly applying to sales talks when selling an article in competition with a like article of another house?

Mr. Bradford: I object to the question as incompetent, irrelevant and immaterial. The "Confidential" itself is the best evidence.

A. No, sir, nothing.

Q. 46. I call your attention to Rule 17 on page 86 of the
233 "Confidential," does that refer to the instructions on the subject of selling a competing line?

Same objection.

A. That is absolutely the policy of the company.

Q. 47. Read the rule?

A. That it pays to adhere strictly to the truth at all times; that it don't pay to speak ill of or even mention your competitor.

Q. 48. State whether or not you showed him those rules?

A. I most certainly did.

Q. 49. State if you know Julius R. Prochnow, and if so, where his business is?

A. Yes, I am perfectly acquainted with Mr. Prochnow, San Antonio, Texas. I sold him a bill of goods three weeks ago.

Q. 50. How long have you been calling on him since you first knew him in this business?

A. I have been calling on him since just three years ago.

Q. 51. State whether or not you ever sold Mr. Prochnow any Quin-Coco?

A. Since I have been calling on Mr. Prochnow I have never sold him a drop of it.

Q. 52. State whether or not you have verified that statement recently from the record?

A. I believe so.

Q. 53. State whether or not that is your recollection outside of the record?

A. I absolutely know I never sold Mr. Prochnow any Quin-Coco personally.

Q. 54. Have you looked up your records on that subject?

A. I have looked up the records.

Q. 55. With what result?

A. With the result I have copies of all of the orders I sold Mr. Prochnow, original orders shipped out by William R. Warner
234 & Company and the Pfeiffer Chemical Company, and on those orders no Quin-Coco appears.

Q. 56. On these orders no Quin-Coco appears?

A. Not on my personal orders.

Q. 57. State whether or not you remember to have discussed with Prochnow the subject of Quin-Coco?

A. I have discussed the subject of Quin-Coco with Mr. Prochnow as I would bring it up in my general sales talk covering every drug in our line in a general way, not specializing particularly on any product.

Q. 58. Julius R. Prochnow, a witness called on behalf of plaintiff in this case, testified as follows:

"Q. 12. Have you ever been solicited to buy Quin-Coco, and if so, by whom, and what inducements were held out as a reason for such a purchase?

A. Yes, William R. Warner & Co.'s salesman solicited my order, and the inducement was the price.

Q. 13. What else was said by William R. Warner's salesman?

A. He told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper.

Q. 14. Did he say anything about what use you could make of it?

A. He intended me to use it instead of Coco-Quinine.

Q. 15. What do you mean by 'instead of Coco-Quinine?'

A. When I got a call for Coco-Quinine or a prescription that it could be used instead."

State whether or not this is true?

A. I solicited Mr. Prochnow's general order for our products, but I did not sell Mr. Prochnow any Quin-Coco. I sold him essence of pepsin elixir, iron, quinine, and strychnine, in competition with other products, aggregating over fifty dollars' worth of our
235 assorted products, but I did not, and have never sold Mr. Prochnow personally any Quin-Coco. I might have said in my demonstrating Quin-Coco, when I came to it, that it was the best

preparation on the market of this kind, barring none, and for unspecified calls for chocolate quinine or syrup of quinine, he was justified in using Quin-Coco or putting it in competition with any over-priced chocolate-quinine preparation on the market, whose ever it may be, but I did not sell Mr. Prochnow any Quin-Coco and never have personally since I called on him, but I have never advised any druggist that he could use Quin-Coco on specific specified calls for Coco-Quinine or any other chocolate preparation where it is specifically called for.

Q. 59. Prochnow testified in the answers just read to you, that you told him he could use Quin-Coco instead of Coco-Quinine, "when I get a call for Coco-Quinine or a prescription, that it could be used instead". State whether or not it is true?

A. It is absolutely false. I do remember telling Mr. Prochnow that he is foolish for paying the difference in price on those items he bought from me, as our system of shipping and billing is direct; billing and eliminating the middleman's profit.

Q. 60. Do you know A. J. Garner, a druggist, and where his place of business is?

A. Yes; Mr. Garner is with the Weyman-Garner Drug Company at Yoakum, Texas.

Q. 61. State whether or not you ever sold him any Quin-Coco, and if so, how much?

A. I have never sold Mr. Garner Quin-Coco since I have been selling goods for the company. I sold him several years, will give the dates of the orders.

Q. 62. State whether or not you verified this from the records?

A. Yes.

Q. 63. Do your records show whether you ever sold Garner any Quin-Coco?

236 A. Personally I have never sold Mr. Garner any Quin-Coco.

Q. 64. State whether or not you ever said to A. J. Garner or in any way gave him to understand that Quin-Coco could be dispensed or used by him for Coco-Quinine?

A. No, sir. I have sold Mr. Garner several years, goods of our line embracing pharmaceuticals in gallon quantities, various elixirs, one particular preparation called "Quinatone", that is a pharmaceutical product the same as any other elixir especially made by William R. Warner & Company.

Q. 65. Is this drug suitable for malaria?

A. Yes, an anti-malaria tonic.

Q. 6. Containing any chocolate?

A. Absolutely none.

Q. 67. State whether or not you have ever in your career as a salesman said to a retail druggist that he could dispense Quin-Coco on a prescription that called for Coco-Quinine?

A. Absolutely none. On a specific specified prescription I would be presuming too far, or a call over the counter, or even a specified call.

Direct-examination closed.

Mr. Bradford, without waiving objections, cross-examines as follows:

X Q. 68. Who did sell Mr. A. J. Garner Quin-Coco?

A. Who did sell him?

X Q. 69. Yes.

A. I never sold him Quin-Coco.

X Q. 70. That does not answer my question.

A. I am not in a position to know. I am the representative in that territory, whether a predecessor did, I do not know. I am not in a position to know.

X Q. 71. Are you in position to swear no one has sold Mr. Garner Quin-Coco while you have been on that territory?

237 A. There was a gallon of Quin-Coco sold the Weyman-Garner Drug Company in 1910.

X Q. 72. By whom?

A. I don't know who represented us.

X Q. 73. Was he a traveling salesman?

A. He was a traveling salesman.

X Q. 74. How long have you been calling on Mr. Garner?

A. Three years on Mr. Garner.

X Q. 75. Is the one gallon sale to which you have referred, the only sale of Quin-Coco ever made to the Weymouth Drug Company, or to the Weyman-Garner Drug Company?

A. I absolutely sold Mr. Garner no Quin-Coco in the three years I have been traveling for the company.

X Q. 76. That does not answer my question.

A. As far as the records of the house indicate, yes.

X Q. 77. What is the preparation "Quinatone", which you have sold?

A. Quinatone is a combination of tincture of cinchona, red, yellow, cinchona, Fowler solution and port wine, tincture pale cinchona, Fowler solution, port wine as the basis for anti-malaria tonic.

X Q. 78. Do you remember what you did say to Mr. Garner when you had your conversation with him, in which Quin-Coco was discussed?

A. No, sir; I never sold Mr. Garner any Quin-Coco, personally.

X Q. 79. What do you mean by personally?

A. When I went there personally to call on Mr. Farner and solicit his orders for our products.

X Q. 80. You have stated that you suggested to Mr. Garner that it was foolish to pay higher prices for several other drugs, but did not make the same suggestion to him with reference to Quin-Coco, are you sure of that?

238 A. Mr. Garner, you see, I made the suggestion——

(Question repeated.)

A. I did not think that Mr. Garner ever handled any Quin-Coco, and did not know it at that time. I demonstrated the general line. I did not specialize on any one particular product.

X Q. 81. You say that you never solicited Mr. Garner's order for Quin-Coco?

A. I solicited his orders in general. I always mention Quin-Coco when I go through the line. "How much Quin-Coco can you use?"

X Q. 82. Did you ever mention Coco-Quinine to Mr. Garner?

A. To my recollection, no, sir.

X Q. 83. Or to any other retail druggist?

A. It is possible that Coco-Quinine has been brought up, that they use it, Ko-Quin, yes, that is brought up every day.

X Q. 84. Is not that frequently and in the way of introducing the subject to retail druggists?

A. Not necessarily.

X Q. 85. But it is sometimes introduced in that way, is it not?

A. Well, in a general way a man selling our products, he covers the line in detail, right through, mentioning all products. We have not the time to anchor ourselves on one product for any period of time.

X Q. 86. What other products similar to Quin-Coco sell for higher prices than Quin-Coco?

A. What other products?

X Q. 87. Similar to Quin-Coco sell for higher prices than Quin-Coco; than your price for Quin-Coco?

Mr. Rawle: There are two questions there, which one do you want him to answer?

A. Well, one in particular; Coco-Quinine is sold in excess of the price of Quin-Coco.

X Q. 88. Any other?

A. Well, I am not in a position to say.

239 X Q. 89. You have stated that you told no retail druggist that he could use Quin-Coco when Coco-Quinine is specified, either on a prescription or on a call over the counter; is that correct?

A. Yes.

X Q. 90. Is that true of all the other products in respect to your line?

A. Yes, absolutely.

X Q. 91. What do you call a specifically specified call?

A. "Coco-Quinine, Lilly," is a specific specified call.

X Q. 92. Suppose a customer asks for Coco-Quinine?

A. It is understood as a Lilly product.

X Q. 92*a*. You have named a number of calls which are common in the drug stores for the quinine preparations in syrup form, in that list you did not mention Coco-Quinine.

A. I presume there are calls for Coco-Quinine.

X Q. 93. Which preparation of syrup of quinine containing chocolate was the first to come to your attention in the drug trade?

A. Well, I do not know that any had been called to my attention until I commenced to associate myself in the pharmaceutical field.

X Q. 94. That was when?

A. That was practically sixteen years ago.

X Q. 95. After you became associated in the drug trade, did you have such preparation called to your attention?

A. Well, in selling, I did not pay particular attention at the time.

X Q. 96. What liquid preparation of quinine containing chocolate or cocoa was the first such preparation that you remember?

A. Well, the one I was thoroughly familiar with and had an opportunity to examine and demonstrate personally, was Quin-Coco.

240 X Q. 97. Why do you qualify your answer?

A. I appreciate that there was a product on the market, but at the time when I was getting the line of our products to sell, I never came in competition with any other article on the market.

X Q. 98. I asked you what other liquid quinine preparation containing chocolate first came to your knowledge in the drug trade and you have answered by a string of qualifications?

A. Quin-Coco is the first one I have been fairly familiar with.

X Q. 99. Did you ever hear of a chocolate quinine preparation containing chocolate before you heard of Quin-Coco?

A. Not to my knowledge.

X Q. 100. Never heard of Coco-Quinine?

A. No. I do not recollect Coco-Quinine when I was associated in the retail drug business.

X Q. 101. When was that?

A. That was pretty near twenty years ago. My memory does not serve back that far.

X Q. 102. How long have you known of Quin-Coco?

A. Since I have been associated with the Pfeiffer Chemical Company and William R. Warner & Company.

X Q. 103. Fourteen years ago?

A. Eight years ago.

X Q. 104. Do you remember Quin-Coco as long as fourteen years ago?

A. Eight years.

X Q. 104. And you have been selling it for fourteen years?

A. No, sir. I was with Searle & Hereth for seven years and we hadn't any preparation of chocolate-quinine. When I was with the Searle & Hereth Company, naturally I went with the Pfeiffer Chemical Company and this product, Quin-Coco, I suppose, was added on about that time. That is when I commenced to

241 become thoroughly familiar with Quin-Coco, its possibilities, its formula, and its method of sales.

X Q. 106. While you were with the S. & H. Company you were familiar with it?

A. I do not know that I ever paid much attention to it, possibly so, possibly I have seen it but I have no recollection.

X Q. 107. I am speaking of while you were with the Searle & Hereth Company?

A. Yes, I suppose I have.

X Q. 108. What were your duties while you were with the Searle & Hereth Company?

A. Call on druggists, physicians, hospitals.

X Q. 109. You were an active salesman for that house?

A. Yes.

X Q. 110. Selling a line of pharmaceuticals?

A. Pharmaceuticals.

X Q. 111. To the retail trade?

A. Yes.

X Q. 112. In what territory?

A. Northern Kansas.

X Q. 113. Were you familiar with the products of your competitors?

A. Quite so, competing articles, yes.

X Q. 114. And you still insist that you did not know of Coco-Quinine, Lilly, at that time?

A. I suppose, as I said before, I knew of it, but I had no occasion to come in competition with it.

X Q. 115. Because you had no opportunity to compete with it, because you had no competing article in your line?

A. No. I had an article called Quinomel for masking the bitterness of quinine. It was an adjuvant in masking and rendering quinine palatable.

X Q. 116. Did it also contain any quinine?

A. It absolutely did not contain any quinine. It was just an adjuvant for combining quinine sulphate.

242 X Q. 117. It would render it sufficiently palatable to be acceptable to the patient?

A. Yes.

X Q. 118. How long have you known Mr. Prochnow?

A. Just the past three years.

X Q. 119. Do you consider him a reliable man?

A. In every way I found him to be, yes.

X Q. 120. Worthy of confidence and belief?

A. I believe that.

X Q. 121. How about Mr. Garner?

A. I have known him for the same period of time, only in a business way, the same as I know Mr. Prochnow. I did not know either gentleman personally, only in a business way.

X Q. 122. What did you mean by "depends on existing demands" in reference to the ability of the druggist to push a certain product?

A. Owing to the existing demand?

X Q. 123. Yes.

A. That applies to medicine in general. The existing demand. You take the South, the climatic condition applies on certain remedies that require a certain demand, existing demands in certain parts of the year. You take this past year, if it was not for chill tonic and quinine preparations in the South, there would be the biggest epidemic of malaria in the history of Texas that we would have had in years.

X Q. 124. What do you refer to as chill tonics?

A. Chill tonic is a tonic for breaking up chills, reducing fevers, quinine is a remedial agent.

X Q. 125. These so-called chill tonics, as a rule generally contain either chocolate or quinine sulphate, do they?

A. Just depends on whose composition it is. Our Quin-Coco we recommend for chills and put it up in a package as a treatment for chills. We put up a "Doctor Hobson" chocolate syrup of quinine for chills in twenty-five cent packages and fifty-cent packages, and it is sold all over my territory.

243 X Q 126. Do you class Quin-Coco as Coco-Quinine among the chill tonics?

A. Well, they can be used and are used, I presume, no doubt.

X Q. 127. I am only trying to get your idea of such tonics, as to the classification in which these various remedies belong.

A. Where you use the term "chill tonics," in a broad sense, you include everything indicated for chills or the preparations containing quinine in mild form. In chills, quinine is the first thought of any druggist, quinine is a sheet anchor for chills.

X Q. 128. Where did you travel with Mr. J. W. Wilkins?

A. I traveled with Mr. Wilkins out of Dallas, east Texas territory.

X Q. 129. Do you remember whether any Quin-Coco was sold while you were with Mr. Wilkins?

A. I do not remember.

X Q. 130. Do you remember whether ny druggist was solicited for an order for this preparation?

A. No doubt; the item appears in our catalogue and our catalogue is covered in entirety. No doubt it was.

X Q. 131. How long have you had a "Salesman Confidential"?

A. "Salesman Confidential," ever since this catalogue has been issued. Since I have been in the employ of the company. Since I have been using the "Confidential," Searle & Hereth, William R. Warner has issued a "Confidential" to their catalogue and now since the amalgamation of the two companies, it is in a combination form, book form.

Mr. Bradford: I wish you would wait until I finish my question before answering.

X Q. 132. Has the salesman creed on page 87 been in all the copies of the "Confidential" which you have had in your possession?

244 A. I do not remember.

X Q. 133. Has the matter on page 86, headed "What a salesman should know," been in all the copies of the "Confidential" which you have had?

A. That I do not know.

X Q. 134. You were authorized to teach Mr. Wilkins the policy of the house, were you?

A. Yes.

X Q. 135. By whom?

A. By the president of the company. He outlined his wishes and the way the line was to be demonstrated to the trade in general.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 136. State whether or not you were employed by the Searle & Hereth Company before that company formed a connection with the Pfeiffer Chemical Company?

A. Yes.

R. D. Q. 137. When the Searle & Hereth Company and the Pfeiffer Chemical Company formed a business connection, did you pass into the employ of the Pfeiffer Chemical Company?

A. Yes.

R. D. Q. 138. Do you remember about when this was?

A. That was possibly seven years ago, when the Pfeiffer Chemical Company took over the Searle & Hereth Company.

R. D. Q. 139. Can you state to your knowledge when those two companies came together?

A. I would say about in 1908; I do not know for sure.

R. D. Q. 140. Do you know what year Mr. G. A. Pfeiffer removed to Philadelphia?

A. In 1908.

R. D. Q. 141. While you were in the employ of the Searle & Hereth Company, and before it became connected with the Pfeiffer Chemical Company, you sold Quin-Coco as a part of the line?

A. I never sold Quin-Coco during the period of the time under the Searle & Hereth management.

R. D. Q. 142. How soon after you became connected with the Pfeiffer Chemical Company did you take up the sale of Quin-Coco in this line?

A. After the change and moving the Chicago laboratory to St. Louis and taking up sales of the combined lines.

R. D. Q. 143. You have previously stated on cross-examination that you knew of Quin-Coco fourteen years ago, what have you to say now?

A. In view of the dates which Mr. Bradford has permitted you to suggest to me, I will have to withdraw the fourteen years. It is since the amalgamation of the Searle & Hereth Company and the Pfeiffer Chemical Company.

R. D. Q. 144. Then, instead of fourteen years, then, what would you say now?

A. I say, since I have been connected with the Pfeiffer Chemical Company.

R. D. Q. 145. Did you as assistant sales manager ever teach any other new salesmen and travel with them?

Mr. Bradford: Mr. Bradford objects to the question as not redirect-examination.

A. Yes.

R. D. Q. 146. How many?

Same objection.

A. I traveled with all the salesmen out of St. Louis with the exception of two and also William R. Warner's salesmen out of Philadelphia, designated by Mr. G. A. Pfeiffer, and also salesmen on the Pacific Coast, beginning from Denver west.

R. D. Q. 147. I think you stated that you received your instructions as to the sales policy from the president of the com-
246 pany, state whether or not you instructed salesmen along those same lines as to the policy of the house?

A. I carried out the wishes of the president of the company the way he wanted the goods demonstrated to the retail trade, in an honorable way.

R. D. Q. 148. State whether or not in doing this you took up the policy as outlined in the "Confidential" and took it from that?

A. At the time when I went out in the general sales capacity, the president outlined his wishes in detail, how the goods were to be demonstrated and to call on each and every druggist in the territory and post the salesmen thoroughly covering our products.

R. D. Q. 149. State whether or not you gave them any instructions as to honesty in selling.

A. I certainly did. I instructed each and every salesman who took an order from the druggist to leave a copy of that individual order with the druggist for the order he solicited and not to misrepresent any articles sold.

R. D. Q. 150. State whether or not as assistant sales manager you had the right to take on and discharge salesmen?

Mr. Bradford: Objected to as not re-direct-examination.

A. That authority was not vested in me.

R. D. Q. 151. In case of a dereliction on the part of the salesman, what was it your duty to do?

Same objection.

A. My visit to the salesman was to assist him in increasing his business and to make a detailed report on my visit with the salesman.

R. D. Q. 152. In case it was called to your attention the salesman had been guilty of impropriety in his work for the company, state what it was your duty to do in such case?

Same objection.

247 A. To go over any matter of that character, and if it was objectionable, if his sales work was objectionable or any of his habits were objectionable, to touch on these points and endeavor to overcome them.

R. D. Q. 153. If you could not overcome his habits of that kind, what was it your duty to do?

A. I would give a report in detail to the house and action was taken from that end.

R. D. Q. 154. State whether or not while you were assistant sales manager you ever had any information or knowledge that any Warner salesman had either suggested to any retail druggist that he could dispense Quin-Coco for Coco-Quinine on a call on a prescription or call over the counter specified.

Mr. Bradford: Objected to as not re-direct examination and grossly improper.

A. No, sir.

R. D. Q. 155. State whether or not if you had any such information that a salesman had done so, would it have been contrary to your teaching and in violation of the selling policy of the house?

Mr. Bradford: Same objection.

A. Yes.

R. D. Q. 156. State whether or not you ever, as assistant sales manager, in any way, directly or indirectly, authorized or suggested to any of your salesmen that he should suggest to any retail druggist that he could dispense Quin-Coco on a physician's prescription or call over the counter, when Coco-Quinine was specifically called for?

Same objection.

A. No sir.

R. D. Q. 157. State whether or not you ever as assistant sales manager did directly or indirectly authorize any retail druggist to dispense Quin-Coco on prescription or on call over the counter when Coco-Quinine was specifically called for.

Same objection.

A. No sir.

R. D. Q. 158. Have you ever had personal knowledge of a retail druggist doing that thing?

Same objection.

A. No sir.

Mr. Bradford recross-examines without waiving any objection.

R. C. Q. 159. Is it not possible that the product you had in mind when you testified that you had been familiar with Quin-Coco for the past fourteen years, so far as that period is concerned prior to the amalgamation of the Searle & Hereth Company with the Pfeiffer Chemical Company, was Coco-Quinine?

Mr. Rawle: I follow Mr. Bradford's practice in objecting as not proper recross-examination.

Mr. Bradford: Mr. Bradford calls attention to Mr. Rawle's question on re-direct examination on this particular subject.

A. My personal acquaintance with Quin-Coco.

The Witness: Read the question again.

R. C. Q. 160. Is it not possible that the product you had in mind as the one with which you were familiar for fourteen years, so far as the period prior to the amalgamation of the Searle & Hereth Company with the Pfeiffer Company is concerned was Coco-Quinine instead of Quin-Coco?

A. Yes, I have been familiar with Coco-Quinine, as I say, but I have not come in direct competition with Coco-Quinine until the past seven years.

R. C. Q. 161. Who was president of the company to whom you have referred?

A. Mr. H. Pfeiffer for the past seven years.

249 R. C. Q. 162. When did he give you a Salesman Confidential?

A. Well, he gave me a Salesman Confidential when I went to work for him in connection with the other catalogues and samples.

R. C. Q. 163. In 1906?

A. At the time of the amalgamation of the companies.

R. C. Q. 164. And that Confidential you used in giving your instructions to salesmen?

A. Well, the instructions in my capacity of course covered every product in our line, general selling policy, and my instructions were to assist the salesmen in increasing the selling of our products in the manner to conform with the policy of the company.

R. C. Q. 165. In Mr. Henry Pfeiffer's original instructions to you did he mention Quin-Coco?

A. No sir, not that I remember, to sell our entire line. I sold the line with him.

R. C. Q. 166. Did he mention to you any other products which might be recommended to the druggist as replacers for the original products of other houses?

A. He demonstrated the general line of the products. I am a druggist personally and a great many of the products I was fairly familiar with, in the pharmaceutical line.

R. C. Q. 167. Mr. Henry Pfeiffer is not a pharmaceutical man, is he?

A. As far as I know he is. He seems very familiar with the line sufficiently so to post all the salesmen he travels with. Mr. H. Pfeiffer covered the line entirely for products we sell.

R. C. Q. 168. Would a salesman necessarily have to misrepresent if he stated to a druggist that Quin-Coco is an exact duplicate of Coco-Quinine, he would not be misrepresenting it, would he?

A. Not if he said it was a better preparation than Coco-Quinine.

R. C. Q. 169. Suppose he told a druggist it was an exact duplicate and no one could tell the difference, would that be misrepresenting?

250 A. That would be through the work of demonstrating the product.

R. C. Q. 170. Would that be misrepresentation?

A. It would, because Quin-Coco is a better preparation than Coco-Quinine.

R. C. Q. 171. How do you know it is a better preparation?
A. I know it from a pharmaceutical standpoint, the physical appearance, and from the comments of the trade, a good many of om I have sold Quin-Coco to and demonstrated.
R. C. Q. 172. Do you know an eminent pharmaceutical professor ned La Wall, of Philadelphia?
. No sir.
. C. Q. 173. Did you ever hear of him?
. No sir.
. C. Q. 174. He was called as an expert by your company in this and testifies that his analysis of these two products does not ose any difference whatever and they are identical, in other ds, identical so far as he could discover?
. That is only one man's opinion.
. C. Q. 175. Do you put your opinion against the analysis of essor La Wall?
I am entitled to my opinion.
C. Q. 176. Is that the kind of opinion that you expressed to trade?
That it is a better preparation, yes.
C. Q. 177. Better preparation than what?
Than any preparation of a similar character on the market, ng none.
C. Q. 178. Did you ever represent that it is a better preparation Coco-Quinine?
I have when occasion demands it, yes, and I considered it so.
C. Q. 179. Who told you that Quin-Coco was a better preparation than Cocoa-Quinine?

Rawle: That is objected to as not proper for recross-nation.

A. I regard it as a superior article from the standpoint of a druggist.
C. Q. 180. Will you explain in what particular it is a better ation?
t is a smoother preparation, it is not inclined to lump. We fresh from our laboratory, gets in the hands of the retailers uick dispatch, the product is not held on the hands of a s shelf for an indefinite period. The article comes in direct satisfactory condition, can be poured out in narrow neck presents a fine appearance pharmaceutically.
. Q. 181. This is the line of argument you put up to your hen the occasion demands it?
es.
Q. 182. Also that it is cheaper in price?
is better than any other priced article on the market.
. Q. 183. As a matter of fact you think that the ordinary or physician can tell the difference in the physical appearthe two products?

Rawle: Mr. Rawle objects to this line as not proper cross-ation.

A. In selling Quin-Coco, it is not my position to demonstrat other products being sold on the market. I demonstrate chiefly th article I am selling.

R. C. Q. 184. Is it not a fact that the demand for Coco-Quinin is the demand that has made the sale for you of Quin-Coco?

Same objection.

A. I cannot say.

Recross-examination closed.

Re-redirect-examination.

By Mr. Rawle:

Mr. Rawle examines without waving any objections.

R. R. D. Q. 185. When you went into your territory, state whether or not you found a demand for quinine as a drug for the cure o chills and fevers and so forth?

252 Mr. Bradford: Objected to as irrelevant and immaterial and too obvious to require an answer.

A. Yes.

R. R. D. Q. 186. State whether or not you found a demand for a sweet or tasteless quinine preparation in which the bitter taste of the quinine was masked?

A. Yes.

R. R. D. Q. 187. State whether or not at that time you found such demand existing without regard to the various preparations on the market for filling the demand?

A. Yes.

HOWARD HENRY RICHARDS.

Sworn to before me the 7th day of December, 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court,
Eastn. Div.-Eastn. Jdcl. Dist. of Mo.

HENRY JOSEPH GONZALES, a witness, called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

A. Henry Joseph Gonzales; age, 32; residence, New Orleans traveling salesman for William R. Warner & Company.

Q. 2. Give a brief statement of what you have done in various capacities since you became connected with the drug business?

A. Well, I worked as drug clerk for a while for Coree & Sauvinet, in New Orleans. I worked for them approximately twelve years. While I was with them I was a prescription clerk. I left 253 them, I think, in 1905, and went to work for Parke, Davis & Company as a traveling salesman selling pharmaceuticals. I worked for them until about fo-r years,—I guess four or five years ago, and then I worked for William R. Warner & Company, where I have been ever since.

Q. 3. What is and has been your territory for William R. Warner & Company?

A. South Louisiana, Central Mississippi and Southern Alabama.

Q. 4. How long have you had that territory?

A. Just about three months now.

Q. 5. Previous to three months ago what was your territory?

A. South Louisiana, Central Mississippi and Southern Arkansas.

Q. 6. What large cities have you in those two territories?

A. Practically no large cities in Mississippi, the largest is Natchez, Vicksburg, Jackson, that is about all of the large cities. In Louisiana, Monroe, La. No large cities in Southern Arkansas. The town of Camden, a town of five thousand population is the largest one I make.

Q. 7. In your present territory approximately how many druggists are there?

A. Approximately three hundred.

Q. 8. In your former territory how many druggists were there?

A. About the same.

Q. 9. How often each year do you visit each of your druggists in the average?

A. Average four times a year.

Q. 10. To what extent do you visit doctors?

A. Well, about the same thing, those that I do visit.

Q. 11. About what proportion of the doctors in your territory do you visit?

A. About one-sixth.

54 Q. 12. Are you a registered pharmacist?

A. I am.

Q. 13. How long have you been a registered pharmacist?

A. Since 1904; that is eleven years.

Q. 14. When you were first taken on as a Warner sales who instructed you as to your duties as a salesman?

A. Mr. Henry Ritavik.

Q. 15. State what instructions he gave you as to the honesty part of your duties?

A. We have a booklet and our "Confidential" that lays particular stress on that as to the honesty, and in handing that to me he told me to be sure and read that very carefully, and gave me to understand what the policy of the house is. It was honesty first, last and all the time.

Q. 16. State how far you have endeavored to carry out those instructions?

A. Right to the letter.

Q. 17. Have you always had a copy of the "Confidential"?
A. Always.
Q. 18. State whether or not you are familiar with the teachings the two last pages of the "Confidential"?
A. I would not say particularly. I have read it and understa it pretty well, yes.
Q. 19. In soliciting sales from a druggist, state whether or n you take up your entire line with him?
A. I do.
Q. 20. State whether or not you put special stress on any one o few items therein?
A. No, sir, I do not.
Q. 21. Have you any usual order in which you take up t different classes of products that you sell?
A. I have, yes, sir.
Q. 22. Give the order.
A. Well, we have a large catalog, which is illustrate
255 and we take it up as they come. For instance, "Non-secret and then perfumes and then pharmaceuticals and then pate medicines; they come in rotation.
Q. 23. From your experience as a retail druggist and a drug sal man, state whether or not it is in the power of a retail druggi if he chose, to push the sale of a given preparation actively a create a market for it?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Repeat that question.

(Question read.)

A. He could.
Q. 24. In what ways?
A. By having confidence in the preparation, knowing just exact what he is giving and he can recommend what he is giving, and as rule a man behind the counter can sell anything he wants. That better illustrated by the many "Non-secret" houses that are in exi ence today.
Q. 25. What houses; what are the names of the "Non-secret houses?

Mr. Bradford: Objected to as incompetent, irrelevant and i material.

A. Hobson's and Meyer, Heyworth, Rexall, Santox, and so o These lines are practically made up by the druggist.
Q. 26. In the lines of these "Non-secret" houses you have me tioned, state whether or not those houses depend upon the druggi to push their lines and create their market for them?

Mr. Bradford: Same objection.

A. Almost absolutely.

Q. 27. Will you state whether the lines of these "Non-secret" houses are very largely sold by retail druggists in the country?

Mr. Bradford: Same objection.

256 A. They are.

Q. 28. How largely?

Mr. Bradford: Same objection.

A. To a very great extent, how much I would not be able to say. They do an enormous business.

Q. 29. State whether or not you find a market in your territory for Quin-Coco?

A. There is.

Q. 30. How well does it sell?

A. Only fair.

Q. 31. State whether or not you have opportunity to become familiar with the stock of a retail druggist whom you solicit?

A. I do.

Q. 32. State whether or not a well-stocked drug store carries preparations which are the product of several houses, but which are similar and medicinally interchangeable?

Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

A. They do.

Q. 33. To what extent do they carry such lines of different makes which are interchangeable?

Mr. Bradford: Same objection.

A. They certainly carry a good many of them, I guess, or most of them in fact.

Q. 34. Are these drugs or preparations having the same pharmaceutical effect and which the druggist could use indifferently or interchangeably if the particular maker's name were not specified?

Mr. Bradford: Same objection.

A. If he so minded, yes.

257 Q. 35. Can you give me any approximate figures as to how many different drugs or preparations there would be in a well-stocked drug store as to its stock of such preparations but of several different makers?

Mr. Bradford: Same objection.

A. No, sir, I don't think so; I don't think I can tell you.

Q. 36. If a retail druggist having a call for a preparation of a specified make should dispense the call with a preparation of a different make than the one specified, state whether or not you would consider that honest business?

A. No, sir, I would not; that would be dishonest.

Q. 37. In such a case state whether or not you would consider that druggist an honest man?

A. No, sir, I would not.

Q. 38. If a drug salesman should suggest to a druggist, a retail druggist, that he could supply the preparation of that salesman when the preparation of another house was called for, state whether or not you would consider such act on the part of the salesman honest?

A. That would be a dishonest act.

Q. 39. State whether or not in such case you would consider the salesman an honest man?

A. I would not consider him as such.

Q. 40. State whether or not you as a salesman have ever made such a suggestion to a retail druggist?

A. I have not.

Q. 41. State whether or not you ever suggested to a retail druggist that he could buy Quin-Coco, S. & H., and sell it on prescription or over the counter when Coco-Quinine, Lilly, was specifically written or called for over the counter?

A. I did not.

Q. 42. If a retail druggist wants to sell a preparation of a certain house when the preparation of another house is specifically called for, state whether or not he has opportunity to do so?

A. He has.

258 Q. 43. More or less frequently?

A. More or less.

Q. 44. State whether or not if he did that he would be doing it knowingly?

A. He would.

Q. 45. State whether or not the line that you carry includes Quin-Coco in two-ounce and four-ounce bottles?

A. It does in two-ounce bottles. Four-ounce bottles, I don't know that we have it. I never have sold it, I don't know.

Q. 46. State whether or not you have sold any Quin-Coco to your trade in two-ounce bottles?

A. Quite a bit of it, yes, sir.

Q. 47. When a druggist buys it in two-ounce bottles how does he sell it, in the original package or otherwise?

A. In the original package.

Q. 48. What label is on the two-ounce bottle of Quin-Coco?

A. "Quin-Coco, S & H," and then the directions.

Q. 49. State whether or not the druggist sells it with that same label on it?

A. Yes, sir.

Q. 50. Do you know a druggist named Edmund F. Barnes; if so, where does he do business?

A. I do; at Macomb City, Mississippi.

Q. 51. Is he in your territory?

A. Yes, sir.

Q. 52. Have you ever solicited his business?

A. Yes, sir.

Q. 53. How big a place is Macomb City?
A. I judge about four or five thousand.
Q. 54. When did you first visit Barnes?
A. Why, when I first went with the house, some time the first month, I worked up the Illinois Central; that was in January, 1914, I presume.

Q. 55. In selling Quin-Coco what is your selling talk?
259 A. Why, I first demonstrate it to a customer and tell him the market there is for it, the amount that he can sell over the counter by recommending it to his trade, and giving them the merits of the preparation; also, if there is a doctor connected with the druggist, I leave a sample with him or sell him a sample, tell him just exactly what the product will do, what it has done.
Q. 56. What do you tell him it will do?
A. For a case of chills, fevers, malaria, it is so nice to give to children, palatable and sweet, and when they come in and ask for chocolate quinine to use this Quin-Coco.
Q. 57. For what other calls over the counter could you sell it?
A. He could sell it, as I said, by recommending it as a palatable preparation of quinine for fever and cold, malaria.
Q. 58. Under what names are these palatable preparations called?
A. Down in Louisiana they call it sweet quinine or chocolate quinine.
Q. 59. Any other names?
A. They call it Quin-Coco, that is some of them do and some of them call it Coco-Quinine.
Q. 60. Any others?
A. No, sir, that is about the only names I know of.
Q. 61. Edwin F. Barnes, called on behalf of the plaintiff in this case, testified as follows:

"Q. 10. Have you ever been solicited to buy Quin-Coco, and if so, by whom and what were the reasons advanced why you should purchase it by the party offering it?
"A. Quin-Coco has been offered us by Mr. Gonzales the salesman and representative of Warner & Co. He offered it to be used as a substitute for Coco-Quinine and said it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quine without any one being the wiser."

260 State whether or not you ever said this to Edmund F. Barnes?
A. I absolutely deny that.
Q. 62. State whether or not this is contrary to your selling methods?
A. Absolutely.
Q. 63. State whether or not you would consider it honest to say those things to a druggist?
A. It would not.
Q. 64. Barnes further testified as follows:

"X Q. 15. Please give the exact words of Gonzales when he offered you Quin-Coco as you have testified?

"A. He said 'How is your stock of Coco-Quinine, why don't you buy our Quin-Coco. It is the same formula and the only chocolate quinine on the market that can be *disposed* for Coco-Quinine without any one being the wiser. Besides it is cheaper.'"

State whether or not you said that to Barnes?

A. No, sir, I did not, absolutely not.

Q. 65. State whether or not that kind of sales talk is according to your sales methods?

A. It is not, sir.

Q. 66. Barnes testified as follows:

"X Q. 21. Did Gonzales suggest that sort of practice to you on Quin-Coco?

"A. He offered Quin-Coco to be used as Coco-Quinine.

"X Q. 22. Meaning that you should dishonestly use Quin-Coco for Coco-Quinine, and pass it off on your customers without telling them?

"A. He suggested that I buy Quin-Coco and dispense it for Coco-Quinine, but there was nothing said of dishonesty.

"X Q. 23. Then you didn't think that he was suggesting any dishonest course to you?

261 "A. He suggested I use it as Coco-Quinine but there was nothing said of dishonesty.

"X Q. 24. Did you understand him as suggesting to you that you should dishonestly dispense it as Coco-Quinine?

"A. I did."

State whether or not you said those things to Barnes?

A. I did not, no, sir.

Q. 67. State whether or not such statements to Barnes would have been in accordance with your sales policy?

A. Repeat that.

(Question read.)

A. It would not.

Q. 68. And practice?

A. No, sir.

Q. 69. State whether or not, in your opinion, such statements to Barnes would have been honest on your part?

A. They would not.

Q. 70. Barnes testified as follows:

"X Q. 36. Give the exact words in which he (Gonzales) offered Quin-Coco to be dispensed on prescriptions?

"A. He asked 'How is your stock of Coco-Quinine,' and asked 'Why don't you buy Quin-Coco, it is the only chocolate quinine on the market that can be dispensed for Coco-Quinine without any one being the wiser."

State whether or not you said that to Barnes?

A. I positively deny that, absolutely so.

Q. 71. Barnes testified as follows:

"X Q. 40. What did he (Gonzales) say?

"A. He said it was the only preparation of chocolate quin-
262 ine on the market that could be dispensed for Coco-Quinine."

State whether or not you said this to Barnes?

A. I did not; positively not.

Q. 72. What did you say to Barnes?

A. Why, there was really at no time any conversation in regard to quinine, particularly Quin-Coco or chocolate quinine or any preparation of that kind which came up as I was selling my regular line of goods and Quin-Coco I was asked in regard to it and I told him he could make a pretty good sale of that product and I went on to explain to him the methods by which it could be sold over the counter particularly.

Q. 73. What did you say in explaining the methods?

A. I told him the demand was very great for this class of preparations, that he could do very good with it; in fact, I would put it up in two-ounce bottles for selling it over the counter. He knew it was good for children. I never had sold him any, didn't sell him any at that time. In fact, I only remember selling Mr. Barnes one bill. He appeared to be very busy and didn't give me much time.

Q. 74. Did that bill include Quin-Coco?

A. No, sir.

Q. 75. State whether or not you remember this particular interview with Barnes?

A. I do not.

Q. 76. Do you remember that you called on him?

A. I do.

Q. 77. And went over your line?

A. Yes, sir.

Q. 78. You remember what you said in going over your line about Quin-Coco?

A. There was no particular stress laid on Quin-Coco.

Q. 79. Do you know Sol C. Ray?

A. I do.

Q. 80. What is his business, and where is it?

263 A. He is a druggist for the Price Drug Company, Brookhaven, Mississippi.

Q. 81. How big a place?

A. About five thousand, I guess.

Q. 82. Sol. C. Ray, when called as a witness on behalf of plaintiff, testified as follows:

"Q. 8. Who offered Quin-Coco to you, and on behalf of what manufacturing house?

"A. Mr. Howard Smith was the first and then Mr. Gonzales.

"Q. 10. Can you remember what was said to you by either of these gentlemen relative to Quin-Coco and Coco-Quinine? If so, will you please state, specifying which salesman made the statements you refer to?

"A. We were offered the Quin-Coco as an article that we could dispense or sell at a bigger profit than we could the Coco-Quinine by both Mr. Smith and Mr. Gonzales.

"Q. 11. Was it your understanding of their representations that you could use Quin-Coco to supply the demand for Coco-Quinine?

"A. Yes, sir; that was the understanding."

State whether or not you ever gave such understanding to Ray?

A. I did not, sir.

Q. 83. State whether or not, if you had done so, it would have been contrary to your regular selling methods?

A. It would.

Q. 84. State whether or not you would have considered it would have been dishonest in you to have done so?

A. It would. If you will, allow me to say there, that that store has been handling that preparation long before I came there. I didn't introduce it. In fact, I don't have to introduce it at all
264 in my territory, and there was no question at no time between Mr. Ray and myself in regard to it.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 85. How many times did Mr. Ritayik visit your territory and make trips with you?

A. Oh, I judge probably three times a year, probably twice a year. I will say, I think twice last year and probably three times this year.

X Q. 86. When was this last trip with you?

A. This was the trip in August.

X Q. 87. What territory did you cover *in* that trip?

A. We only worked one day together, that was when he came to see me in regard to this change of territory, Arkansas to Alabama.

X Q. 88. Where did you work that one day?

A. We worked in Vicksburg and we made a few towns adjoining Vicksburg on the Y. & M. V.,—Yazoo and Mississippi Valley.

X Q. 89. How long was he with you on this first visit?

A. Three days.

X Q. 90. That is when you first went to work for him?

A. Yes, when I first went to work,—about three days.

X Q. 91. What territory did you make during that visit?

A. On the first visit we worked in Brookhaven, on the Illinois Central road.

X Q. 92. What towns?

A. All of them from Ozyka to Jackson.

X Q. 93. Calling on retail druggists?

A. Yes, sir.

X Q. 94. What class of physicians do you visit?

A. Dispensing doctors.

X Q. 95. In selling your goods do you mean that you have no specialties that you prefer or push over others?

265 A. I have such a large line that we haven't time to waste on any particular item.

X Q. 96. What territory did you cover while you were with Parke, Davis & Company?

A. Southern Louisiana.

X Q. 97. What years did you work there as a salesman?

A. I worked that for a year first and left them in 1908 or '09, I think. I am not positive about that. Then I was away from that for about eight months and went back and stayed with them three years. I would not be absolutely positive about that time. It is approximately that time.

X Q. 98. In speaking to Mr. Barnes in reference to the large market for such a preparation, what preparation did you have in mind?

A. A large market for any particular preparation.

X Q. 99. Yes. I think you told him there was a large demand for such a product as Quin-Coco, and you thought he could sell lots of it?

A. No, there wasn't any great demand. He could build up a good business on Quin-Coco, I told him by putting it up in two-ounce bottles or buying it in original two-ounce bottles, and I recommended it, but there is not such a big demand. I told him he could create a big demand.

X Q. 100. Was or was there not a large demand for Coco-Quinine in that territory?

A. I cannot say.

X Q. 101. What preparation was Mr. Barnes using in his drug store at that time?

A. I never have sold him any, I don't know. I haven't sold him any Quin-Coco.

X Q. 102. I mean, what quinine preparation in liquid form, containing chocolate?

A. I don't know, sir.

X Q. 103. Didn't you go behind his prescription counter?

266 A. I did.

X Q. 104. And inspect his stock?

A. Not closely.

X Q. 105. Didn't you see a bottle of Coco-Quinine?

A. I would not say that I did.

X Q. 106. Would you be willing to say that you did not?

A. No, I don't know.

X Q. 107. Did you ask him as to the demand for Coco-Quinine in his store?

A. No, sir.

X Q. 108. Did you ask him as to what he was selling of that product?

A. No, sir.

X Q. 109. Didn't you ask him why he need pay the Lilly price when you could sell him Quin-Coco at a much lower price?

A. I did not.

X Q. 110. You deny in toto everything that Mr. Barnes testified to on this subject?

A. Absolutely so, yes, sir.

X Q. 111. You charge Mr. Barnes with lying in this testimony that he has given?

A. Yes, sir.

X Q. 112. What object do you suppose Mr. Barnes might have had in so doing?

A. I don't know of any object that he had. I couldn't possibly tell. There was never any conversation of that kind between him and I, positively not. I can remember every occasion I was in his store. There was never any question of that kind. I solicited him on Quin-Coco as I would on Salysilic or Sloan's Liniment, or anything of that kind. As I say, I never sold him at that time and never sold him since.

X Q. 113. Have you continued to call on him?

A. Yes, sir.

X Q. 114. You have known him how long?

A. Just since I have been in the territory; about two years approximately.

267 X Q. 115. He was in your territory when you were traveling for Parke-Davis?

A. No, sir.

X Q. 116. Do you know Mr. Barnes' reputation for honesty and veracity in his community?

A. I do not.

X Q. 117. Did you ever hear anything said derogatory to his character?

A. I have not.

X Q. 118. Did you ever say to any druggist in your territory that Quin-Coco could be dispensed when Coco-Quinine was called for?

A. I did not.

X Q. 119. Did you ever represent to any druggist in your territory that any other product in your line could be dispensed for a product of a competing house when that product was called for?

A. I did not.

X Q. 120. Did you ever meet Coco-Quinine in your travels as a salesman for Parke-Davis & Company?

A. A few times.

X Q. 121. Pretty generally in the stores in that territory, was it not, at that time?

A. Why, I never made any particular stress or watched Coco-Quinine particularly.

X Q. 122. Did you ever hear of a preparation of quinine sulphate in liquid form containing chocolate before you heard of Coco-Quinine?

A. I can't say that I have.

X Q. 123. Isn't it a fact that Coco-Quinine had a large market and there was a large demand for this product in your territory?

A. I don't know, sir.

X Q. 124. In what form do you sell the larger part of your Quin-Coco, I mean, in what sized packages?

A. In bulk, in gallons.

X Q. 125. How do you find the trade in Quin-Coco in your territory?

268 A. Why, there is not a very great demand for it there. I sell some of it. There is quite a few products I sell more of than I do Quin-Coco.

Cross-examination closed.

Deposition closed.

HENRY J. GONZALES.

Sworn to before me the 7th day of December, A. D. 1915.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the United States, District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

By agreement of counsel the further taking of testimony is adjourned to Wednesday, December 8th, 1915, at 9.30 o'clock a. m.

Wednesday, December 8th, 1915—9.30 a. m.

Met pursuant to adjournment.

CLINTON GORDON MCCARTHY, a witness called by and on behalf of the defendant, having been first duly sworn, deposes and says, in answer to interrogatories propounded to him by counsel:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

A. Clinton Gordon McCarthy; age, 32; residence, Mobile, Alabama; no occupation at present.

269 Q. 2. What has been your connecton with the drug business from the beginning; state it consecutively?

A. I began with Sutton Brothers in Mobile in 1907 as a clerk; they were retail druggists, and I worked there until 1911. It was a medium sized drug store. I was prescription clerk and buyer. I then went in the employ of William R. Warner & Company as traveling salesman. I remained in their employ until November the 11th, 1915. I then partly resigned and figuring on going into the drug business at this time.

Q. 3. What was your territory when you were in the employ of the defendant?

A. East Tennessee, including Nashville and Knoxville.

Q. 4. What was your previous territory?

A. South Alabama, including Montgomery and Selma.

Q. 5. During what years did you cover the South Alabama ter tory?

A. From 1911 until August, 1915.

Q. 6. Did you sell the entire Warner line always?

A. Yes, sir.

Q. 7. About how many items?

A. Something over five or six thousand items.

Q. 8. How many druggists in your first territory, approximately

A. I couldn't state.

Q. 9. How often did you visit them?

A. About every ninety days.

Q. 10. How often did you visit doctors?

A. Well, some I visited ninety days, some six months.

Q. 11. What proportion of the doctors did you solicit in your te ritory?

A. About 75 per cent., that is dispensing doctors.

Q. 12. What are dispensing doctors?

A. A doctor who dispenses his own medicine.

Q. 13. When you first came into the employ of Warner &
270 Company did you have any instructions as to the policy o the house on sales methods, and from whom?

A. From Mr. Ritavik, and my instructions were that we were to sell all goods on an honest basis, straightforward and honest basis, and no transactions were to be made that in our estimation the house would not like.

Q. 14. Did he give you a copy of the "Salesman's Confidential?"

A. He did; yes, sir.

Q. 15. How far did he instruct you on the selling rules contained therein, and particularly pages 86 and 87, which I hand you?

A. He instructed me in all of these, and especially as to the honest dealings with the customers.

Q. 16. What stress was laid upon the rule in that "Confidential" as to competitors' goods?

A. That we were to avoid mentioning all competitors' goods, and that we were out to sell William R. Warner's or Pfeiffer's Chemical Company's goods, or their line.

Q. 17. State whether or not in your work for the house as sales- man you obeyed those instructions?

A. I did.

Q. 18. In going the rounds of the retail druggists have you access to their stock of goods behind the counter usually?

A. Yes, sir.

Q. 19. Are you able to familiarize yourself with the stock which they carry?

A. Yes, sir.

Q. 20. Will you state whether or not a fairly well stocked drug store carries preparations of a similar medicinal kind, but made by different drug houses?

Mr. Bradford: Objected to as immaterial, irrelevant and incom- petent.

A. Yes, sir; they do.

Q. 21. Can you say whether or not these different preparations made by different houses are pharmaceutically interchangeable and one could be used for the other with the same medicinal effect?

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Mr. Bradford: Same objection.

A. Some are.

Q. 22. If a prescription contains one of these interchangeable preparations, but does not specify the name of the particular maker, state what the druggist can do in filling such prescription?

Mr. Bradford: Same objection.

A. I don't hardly understand that question.

Q. 23. If the druggist carries on his shelves that specified preparation made by several different makers, which makers can he use?

Mr. Bradford: Same objection.

A. The one specified.

Q. 24. My question was as to a prescription which specified the preparation, but did not specify the maker, in that case what can a druggist do?

Mr. Bradford: Same objection.

A. I think he can use his discretion as to what to dispense.

Q. 25. If the prescription specifies the preparation and specifies the name of the maker, what is the druggist's duty?

Mr. Bradford: Same objection.

A. To dispense the one called for.

Q. 26. If, without telling the doctor, the druggist on a prescription specifying the name of the maker should dispense another make of that drug, would that be honest in the drug business?

A. No, sir.

Q. 27. Would you consider it honest?

A. No, sir.

Q. 28. If there is a call over the counter for a given drug and the druggist passes off on a customer some other drug, state whether or not that is considered honest in the drug business?

272

A. No, sir.

Q. 29. Do you consider it honest?

A. No.

Q. 30. If a drug salesman should suggest to a druggist that he could dispense Quin-Coco when the physician's prescription or a call over the counter specifically called for Coco-Quinine, state whether or not that would be honest in the salesman?

A. No, sir.

Q. 31. If a drug salesman should suggest to a druggist that he could dispense Quin-Coco when a physician's prescription or a call

over the counter specifically called for Coco-Quinine, state whether or not that would be honest in the salesman?

A. No, sir.

Q. 32. Do you know Oscar J. McMillan, and if so, where is his drug store?

A. Yes, sir, I know him; his drug store is Pritchard, a suburb of Mobile.

Q. 33. For how long have you called on McMillan at his drug store?

A. Well, I saw McMillan in his present location one time.

Q. 34. What about some other location?

A. At one time he was at Whistler, Alabama, with Dr. Gay.

Q. 35. State how often you called on him for business at either of those places, approximately?

A. About six months, every six months.

Q. 36. How many calls including both places?

A. I believe three times.

Q. 37. How considerable were these two drug stores in amount of business and stock?

A. I considered they carried about two to three thousand dollars stock.

273 Q. 38. You said that you had solicited McMillan's trade three times?

A. About three times.

Q. 39. When were these three times?

A. I don't remember the date; the last time, I think, was in June or July, 1915; I don't remember the exact date.

Q. 40. Do you remember a call at the end of February, 1915, after McMillan went into business for himself?

A. No, sir; I don't remember.

Q. 41. Oscar J. McMillan, when called as a witness for plaintiff, testified as follows:

"Q. 4. Did you ever hear of a preparation called Quin-Coco, and if so, when and under what circumstances?

A. I heard of it through the William R. Warner & Company's salesman, Mr. McCarthy.

Q. 5. What did Mr. McCarthy say to you on this subject?

A. He asked me if I didn't want some of their preparation, Quin-Coco. I told him, 'No, we couldn't substitute.' He told me it was all right, that it was the same thing as Coco-Quinine, that you couldn't tell the difference. And that it was the original preparation, brought out by a doctor who didn't have the money to back it up with advertising. And that in the meantime Lilly had put Coco-Quinine on the market, and that then Warner brought out this Quin-Coco and put it on the market. He told me it would not be substituting at all, that you couldn't tell the difference between it and Coco-Quinine. That is about all.

Q. 6. In what way did he tell you that it could be used or dispensed, that is, in response to what character of calls on demands?

A. As Coco-Quinine.

Q. 7. What kinds of calls for Coco-Quinine?
274 A. Either prescriptions or calls over the counter."

State whether or not that testimony of McMillan, which I have read to you, or any part of it, is untrue?

A. The only true part of that question is that I asked him did he want some Quin-Coco.

Q. 42. What have you to say as to the rest of his answers?

A. It is untrue.

Q. 43. State whether or not that talk with a druggist would be in accordance with the policy of your house and of your instructions from the house?

A. This as he put it here would not be in accordance with the instructions of the house.

Q. 44. In selling Quin-Coco to a druggist what is your sales talk?

A. "Mr. Druggist, how is your chocolate quinine today?" I then show him my sample. "I have a nice smooth preparation here containing two grains of quinine to a teaspoonful, put up in light chocolate syrup, easy to handle, easy to dispense in a small bottle; will not sour or lump."

Q. 45. What about mentioning in such talk any competitor's name or product?

A. Never mention a competitor's name or preparation unless first brought up by a druggist.

Q. 46. McMillan further testified:

"X Q. 24. Do you say that he meant to make you a dishonest suggestion as to how you could sell Quin-Coco?

A. I would consider it dishonest if I sold it like he told me."

State whether or not you made McMillan any dishonest suggestion as to how he should sell Quin-Coco if he bought it?

A. I did not.

Q. 47. McMillan further testified in answer to X Q. 32:

275 "No, sir; we had quite an argument as to its merits when compared with Coco-Quinine."

State whether or not such argument took place?

A. It did, and he wanted to know what kind of preparation we had. I told him I considered we had the best preparation on the market of its kind and we sold it on a straight guarantee and if it did not come up to what he thought it should, why, to return it and get credit for it.

Q. 48. McMillan testified further:

"X Q. 33. What did he say of its merits?

A. That it was the same as Coco-Quinine and could be dispensed without the doctor or patient detecting it."

What have you to say as to this statement?

A. It is untrue.

Q. 49. Do you know John B. Reid, and if so, where is his drug store?

A. Yes, I know him; he is in Union Springs, Alabama.

Q. 50. How big a place?

A. About four or five thousand, I suppose.

Q. 51. State whether or not you called on Reid about three years ago last June?

A. I don't remember the date. I called on him three years ago, I don't remember, in June or July.

Q. 52. Did you offer him your entire line?

A. I did.

Q. 53. Did you offer him Quin-Coco?

A. Yes, sir.

Q. 54. John B. Reid, when called as a witness for the plaintiff, testified as follows:

"Q. 12. Do you know anything about the product called Quin-Coco, and if you do, what can you tell us about it?

276 A. I do; it is a preparation manufactured by Searle & Hereth Company. My first knowledge of it, it was represented to me to be the same as Coco-Quinine by Mr. McCarthy, a Warner salesman; that was about three years ago.

Q. 13. As near as you can recall what did Mr. McCarthy say to you upon this subject?

A. To the best of my memory, it was about something like this: He asked me if I used very much Coco-Quinine. I told him that I used a good deal. He then said that he could save me some money on the product. He showed me the sample of Quin-Coco and made me a price of $3.50 a gallon, and I bought one gallon.

Q. 14. Did he tell you how you could sell it or dispense it, and if so, what did he say?

A. He simply sold it to me as a product to take the place of Coco-Quinine; said that it contained the same amount of quinine, and would take the place of Coco-Quinine.

Q. 15. In what way would it take the place of Coco-Quinine?

A. It would have the same effect, that is, Quin-Coco would have the same effect as Coco-Quinine.

Q. 16. You already testified you never had any demand for Quin-Coco; how did you expect or he expect for you to dispense Quin-Coco if you had no demand for it?

A. I gathered from his conversation at the time that I bought it, that I bought Quin-Coco, that I would have to sell it as a substitute for Coco-Quinine.

Q. 17. Do you mean, to supply the demand for Coco-Quinine?

A. I do."

What have you to say as to the truthfulness or untruthfulness of this statement? I hand you the printed plaintiff's record and indicate the questions and answers which I have just dictated to the stenographer in this question.

277 A. At the time I called on Mr. Reid and showed him this Quin-Coco I never mentioned Coco-Quinine at all. He w

miliar with the Quin-Coco preparation before and I never made ny suggestions whatever as to how he was to dispense of it or sell it.

Q. 55. Had he bought Quin-Coco before from you?

A. Not from me; no, sir.

Q. 56. Do you know whether he had previously carried Quin-Coco n his shelves?

A. I don't remember, but I think he said he had. Any way he ad other preparations similar and some he said had not given tisfaction.

Q. 57. Did he name such other preparations?

A. I don't remember him naming them.

Q. 58. Do you know a druggist named John M. Moseley, and here is his drug store?

A. Yes, I know him; he is located at Geneva, Alabama.

Q. 59. How big a place?

A. I suppose about two thousand.

Q. 60. Did you ever call on him for his trade?

A. Yes, sir.

Q. 61. John M. Moseley, when called as a witness on behalf of ne plaintiff, testified as follows:

"Q. 15. Please state as near as you can recollect what Mr. Mc-Carthy said to you when he offered to sell you Quin-Coco?

A. Well, he was in my prescription room looking over my wants nd asked me if I needed some Coco-Quinine, and I don't know ust what reply I made to that, but the questions came up that is people did not make Coco-Quinine and he told me his was a imilar and just as good a preparation.

Q. 16. What else did he say about it, if anything?

A. He said his sales on that preparation were larger than Coco-Quinine. He told me the other people were using it; that there vas a saving in the price, but I don't remember the exact amount.

Q. 17. What did he tell you that the other people were 78 using it for, and what did he tell you that you could use it for?

A. For Coco-Quinine.

Q. 18. What do you mean by that it could be used 'for Coco-Quinine'?

A. I gave my testimony that it was used on physician's prescriptions and dispensed on calls, that is the only way I could use it. There is no other purpose for it."

What have you to say as to the truthfulness or untruthfulness of this estimony of Moseley? I hand you the plaintiff's printed record, and all your attention to the questions and answers which I have just dictated to the stenographer.

A. On this call on Mr. Moseley I asked him when we were in the prescription room, I asked him about his chocolate quinine. He had on the shelf at the time a gallon of H. K. Wampole Chocolate Quinine preparation, and Mr. Moseley said that his experience had not been very good with those preparations, and that he would prefer Lilly's, and of course he never bought any Quin-Coco from me.

Q. 62. I call your attention to question 17 put to Moseley and his answer. What have you to say to his testimony in answer to that question?

A. I made no suggestions whatever as to what he should use it for.

Q. 63. State whether or not you ever personally saw a retail druggist dispense Warner's Quin-Coco—I mean Searle & Hereth's Quin-Coco, when Lilly's Coco-Quinine was specifically called for?

A. No, sir.

Q. 64. You are a registered pharmacist, I understand?

A. Yes, sir.

Q. 65. As such and as a drug salesman state whether or not a retail druggist can by special effort create a market or demand for a given preparation?

279 Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

A. Yes.

Q. 66. By what efforts can be accomplish this?

Mr. Bradford: Same objection.

A. By recommending them to his customers.

Q. 67. What customers?

Mr. Bradford: Same objection.

A. His friends or his patrons that call on him and ask him to recommend any preparation for sickness or for babies, different kinds of diseases, and by advertising them.

Q. 68. How about his doctors who send him their prescriptions?

Mr. Bradford: Same objection, and as leading.

A. By recommending them to the doctors.

Q. 69. On what calls can a druggist sell Quin-Coco?

A. On calls for Chocolate Syrup, Chocolate Quinine Syrup, Sweet Syrup of Quinine, on calls for something for babies' colds, fever, malaria.

Q. 70. At that interview with Mr. Moseley how much time did you spend with him?

A. I suppose about forty-five minutes.

Q. 71. State whether or not in this forty-five minutes you took up your entire line and went over it with him?

A. Yes, sir; I sold him an order of the entire line.

Q. 72. How large an order, do you remember?

A. Well, I don't remember exactly, somewhere between fifty and seventy-five dollars, I think.

Q. 73. Do you remember what the order consisted of that he gave you?

A. I don't remember all. There was pharmaceuticals, "non-secrets," Pfeiffer's goods and also some patents.

Direct-examination closed.

280 Cross-examination.

By Mr. Bradford:

X Q. 74. Did you receive any instructions as to the selling policy of the house or as to its products at any time from any other person than Mr. Hitavik?

A. No, sir; only by letter.

X Q. 75. You mean by circular letter from the house?

A. By circular letter from the house.

X Q. 76. Had you ever visited the laboratories at St. Louis?

A. Yes, sir.

X Q. 77. While there did you ever have any conversation with any person with reference to products?

A. I had it with the head of the department.

X Q. 78. Mr. Merner has testified that it is part of the training of the salesman to have them when they visit laboratories to visit each department of the plant. You followed this general plan, did you?

A. I did; yes, sir.

X Q. 79. You remember the heads of the several departments?

A. No, sir; I do not.

X Q. 80. When was this?

A. It is about a year or nine months ago as well as I remember.

X Q. 81. Only the one time?

A. One time.

X Q. 82. You remember any conversation with Mr. Garvin in the manufacturing department?

A. Nothing special, only showing me how the different preparation was kept, the crude drugs and everything, and the sanitary conditions and that everything was tried to be put out in the very best shape and they tried to keep everything clean.

X Q. 83. Didn't he show you how similar some of your products were to the products of other houses?

A. He did not.

X Q. 84. Didn't he show you how similar Quin-Coco was to Coco-Quinine?

281 A. No, sir.

X Q. 85. You remember mentioning or having Mr. Garvin mention to you the subject of Quin-Coco or Coco-Quinine?

A. The only thing he mentioned of Quin-Coco was, we passed—I don't know what you call the place they make it—he showed me where they make Quin-Coco; that is all he said. I was familiar with Quin-Coco.

X Q. 86. Did you see any of the original bottles or packages of Coco-Quinine at that time?

A. No.

X Q. 87. You left the employ of William R. Warner & Company, November 11th, 1915?

A. Yes, sir; November 11th, 1915.

X Q. 88. At present you have no employment?
A. No employment.
X Q. 89. Any in prospect?
A. Yes, sir.
X Q. 90. What prospect?
A. Going into the drug business.
X Q. 91. Where?
A. In Mobile, Alabama.
X Q. 92. By yourself?
A. No.
X Q. 93. With whom?
A. With Sutton Brothers and Julius Hammel and Dunas.
X Q. 94. As a clerk?
A. As manager.
X Q. 95. Of their several stores?
A. Yes, sir. In fact, we were figuring—there was two stores sol there Monday—we were figuring on buying these out. I don't know whether we got them or not.
X Q. 96. Why were you changed from the Alabama territory t the Tennessee territory?
A. When they changed several different territories I asked fo a change from the Alabama territory and they changed
282 several different salesmen to make the Tennessee territory for me.
X Q. 97. You say in visiting the druggists in your territory you always sold the entire line?
A. As near as I could I pushed the whole line.
X Q. 98. You don't have any favorites?
A. None whatever.
X Q. 99. Among your items?
A. No, sir.
X Q. 100. And the line consists of five to six thousand items?
A. Yes, sir.
X Q. 101. You made as much effort on each of these items as you did on any other item in the line?
A. Yes, sir.
X Q. 102. And you showed Mr. Moseley the entire line in forty-five minutes?

Mr. Rawle: That is objected to because the witness has not really said so.

A. About forty-five minutes. He was not busy at the time and we went through the whole line.
X Q. 103. Can't you remember or state with some degree of accuracy about how many druggists there are in the first territory where you were working?
A. No, sir.
X Q. 104. You haven't any idea?
A. No, sir.
X Q. 105. Did Mr. Ritayik travel with you in the territory at any time?

A. Yes, sir.

X Q. 106. You remember the dates of any trips he made with you?

A. No, sir.

X Q. 107. Did he make a trip with you when you were first employed?

A. Yes, sir.

X Q. 108. How many days did he spend with you at that time?

383 A. Three days.

X Q. 109. What was the date of that?

A. I don't remember exactly. It was the last of August, 1911.

X Q. 110. You remember the territory worked during that three days?

A. Montgomery and adjacent territory.

X Q. 111. When was Mr. Ritayik with you last?

A. November 11th, 1915.

X Q. 112. Where?

A. At Columbia, Tennessee.

X Q. 113. How long at that time?

A. Two days.

X Q. 114. Both days at Columbia?

A. No.

X Q. 115. What other place?

A. Well, I don't remember all of them; some small towns on the Louisville and Nashville road; I don't remember the names of all of them.

X Q. 116. What did Mr. Ritayik say to you with reference to the matter on pages 86 and 87 of your "Salesman's Confidential?"

A. We were to be governed strictly by those instructions.

X Q. 117. Did he pay any special attention to those two pages or instruct you to follow the "Confidential" generally?

A. He instructed me to follow the "Confidential" generally, but laid special stress on those two pages.

X Q. 118. Did he read them to you?

A. Yes, sir.

X Q. 119. In full?

A. Yes, sir.

X Q. 120. What have you to say of Mr. Ritayik's testimnoy already in the case that he merely instructed the salesman to read the "Confidential" from cover to cover?

A. I have nothing to say about that. The only thing I have to say is what he did to me.

384 X Q. 121. He picked out pages 86 and 87 for you?

A. No, he instructed me to follow the whole "Confidential," but read to me pages 86 and 87 and I read it myself.

X Q. 122. Can you repeat part of it?

A. It is the way a salesman is supposed to treat his trade and the methods of the house for handling the trade.

X Q. 123. How recently have you read those pages?

A. I haven't read them in a year or two years.

X Q. 124. Haven't you read them in the last day or two?
A. No, sir.
X Q. 125. Your attention was called to them and to special part in your direct-examination; didn't you refer to them then?
A. My attention was called to them.
X Q. 126. Yes.
A. Of course, the "Confidential" that they give me I read, but I haven't read it in the last two or three days.
X Q. 127. When was the "Confidential" given to you?
A. When I first went to work for William R. Warner & Company
X Q. 128. Did you ever have more than one?
A. I had them changed for new prices.
X Q. 129. Was your attention called to pages 86 and 87 when you had your first copy?
A. Yes, sir.
X Q. 130. By Mr. Ritayik?
A. By Mr. Ritayik and the house also.
X Q. 131. And that is the time he read you those pages?
A. Yes, sir.
X Q. 132. In August, 1911?
A. Yes, sir.
X Q. 133. Have pages 86 and 87 been changed in the "Confidential" since that time?
285 A. Not that I know of.
X Q. 134. Same now as they were then?
A. Yes, sir.
X Q. 135. You are very familiar with the stock of drugs behind the prescription counter of your trade?
A. Yes, sir.
X Q. 136. You noticed Mr. Moseley's stock of preparations?
A. Yes, sir.
X Q. 137. Whose make of the preparations similar to Quin-Coco did you say you saw?
A. Henry K. Wampole's.
X Q. 138. Any other?
A. No.
X Q. 139. You didn't see any Coco-Quinine, Lilly?
A. No, sir; he had none.
X Q. 140. Was he selling the Wampole preparation?
A. I couldn't say.
X Q. 141. He didn't have a Lilly bottle in his store?
A. None that I saw.
X Q. 142. But you did see the Wampole bottle?
A. I did.
X Q. 143. Yet he told you he preferred the Lilly preparation?
A. He said he had bad luck with the other preparation and from them on he would prefer Lilly's.
X Q. 144. And he had been selling the Lilly's?
A. He didn't say he had been.
X Q. 145. Didn't he tell you that Wampole bottle had been setting on his shelves for a number of years?

A. No, sir.
X Q. 146. And he had been using Lilly's?
A. No, sir.
X Q. 147. And that Wampole's preparation was spoiled?
A. No, he did not.
X Q. 148. He didn't tell you any of those things?
A. No.
X Q. 149. How can you remember the Wampole bottle so clearly and can't remember the other?
286 A. Because I saw it.
X Q. 150. Isn't the Lilly bottle quite as conspicuous as the Wampole bottle?
A. It is, but I didn't see Lilly's.
X Q. 151. Where did you get the information that Quin-Coco was the original preparation, as stated to Mr. McMillan?
A. I didn't get that information. Mr. McMillan stated an untruth.
X Q. 152. Is Mr. McMillan a man you had known for some time?
A. For about a year and a half, two years.
X Q. 153. You know him pretty well?
A. No, sir; I only called on him three times, I believe.
X Q. 154. You know nothing about his reputation in the community?
A. Nothing whatever.
X Q. 155. But in this particular you say that he perjured himself?
A. Yes, sir.
X Q. 156. Can you imagine any reason why he would?

Mr. Rawle: I object to the use of the word indicating a statutory crime, which may be misunderstood by the witness.
Mr. Bradford: I think the witness should understand the gravity of the charge he has made against Mr. McMillan, and also the gravity of an offense of testifying falsely under oath.

A. Yes, sir.
X Q. 157. Can you imagine any reason why he would?
A. Well, none whatever. I don't know him very well.
X Q. 158. Does he have any feeling against you?
A. No, none that I know of.
X Q. 159. Has he ever shown any disposition antagonistic to your house?
287 A. No, sir.
X Q. 160. Or the house you represented at that time?
A. No, sir.
X Q. 161. You asked Mr. McMillan if he wanted some chocolate quinine?
A. Yes, sir.
X Q. 162. That is the way you introduced the subject to him?
A. Well, I was selling him patents and we were in the prescription room talking over the different pharmaceuticals and I was endeavoring to sell him a five gallon assorted bill of pharmaceuticals and at

that time I mention Quin-Coco or chocolate quinine. I generally asked him how is his chocolate quinine.

X Q. 163. That is the way you usually introduced the subject to the druggists?

A. Yes, sir.

X Q. 164. Asking them how is their chocolate quinine?

A. How is your chocolate quinines, being a number of different other manufacturers making similar preparations.

X Q. 165. What other preparations have you in mind?

A. Well, Tilden & Company, H. K. Wampole & Company, Henry S. Wampole, G. F. Harvey & Company, National Drug Company and Meyer Brothers and Allan-Pfeiffer.

X Q. 166. All of those houses have chocolate quinine preparations in that territory?

A. Yes, sir.

X Q. 167. All in competition with you?

A. Yes, sir.

X Q. 168. Those are all you remember?

A. Possibly some others, but that is all I remember at present.

X Q. 169. Did you ever hear of Coco-Quinine, Lilly?

A. Yes, sir.

288 X Q. 170. That was not in your territory?

A. Yes, sir; that was in my territory.

X Q. 171. Why are you so careful from refraining to mention this preparation?

A. In the case we were talking of I didn't think it necessary to mention it.

X Q. 172. Which preparation did you meet most frequently in your trade?

A. I am unable to say. They were all very well distributed through the country.

X Q. 173. Did you find the drug stores as well stocked with the other makes as you did with the Coco-Quinine, Lilly?

A. Not all of them.

X Q. 174. Any of them?

A. Yes, sir.

X Q. 175. Name them?

A. I can't name them now.

X Q. 176. Name any who carry all lines?

A. Not all lines; they had one or some two similar preparations.

X Q. 177. Please name some having two similar preparations?

A. There is Moseley, for one he had Wampole's.

X Q. 178. Who else?

A. I don't remember the rest of them now. I never paid any special attention to that.

X Q. 179. What other preparation did Moseley have besides Wampole's?

A. Nothing that I know of but Wampole's.

X Q. 180. You were in that territory from 1911 until 1915?

A. Until 1915.

X Q. 181. Calling on the drug trade four times a year approximately?

A. Four to five times a year.

X Q. 182. And can't remember any drug store but Moseley's that sold any specific preparation of this character other than Lilly's or Warner's?

289 A. It is immaterial to me. I never paid any special attention to it.

X Q. 183. You had no trouble in remembering the Wampole package. You saw it in Moseley's?

A. That was brought up after this case was started.

X Q. 184. You say you never mentioned the name of a competitor or a competitor's product in introducing your products at all?

A. No, sir; until brought up by the druggist.

X Q. 185. You remember saying anything to Mr. McMillan or Mr. Reid or Mr. Moseley about Coco-Quinine?

A. Only this: They asked me how Quin-Coco compared with Coco-Quinine. I told them it contained two grains of quinine to a teaspoonful and a taste of chocolate syrup.

X. Q. 186. Did you tell each of them that?

A. I don't remember of telling each of them that.

X Q. 187. Did each of them ask you that question?

A. I don't remember.

X Q. 188. What other preparations of this character had Mr. Reid used before you visited him and introduced the subject of Quin-Coco?

A. I don't know.

X Q. 189. Do you know whether he had handled Coco-Quinine?

A. I don't know.

X Q. 190. You didn't ask him?

A. I didn't ask him.

X Q. 191. You didn't see any Coco-Quinine bottles?

A. Not behind his prescription counter I didn't.

X Q. 192. Ever been behind his prescription counter?

A. I have been back there, but at the time this occurred I was not.

X Q. 193. At any time you have been behind his prescription counter did you see a Coco-Quinine bottle?

A. I did.

X Q. 194. How long have you known Mr. Reid?

290 A. Something like three and a half, or four years.

X Q. 195. Is he a man of good reputation?

A. As far as I know. I have no intimate acquaintance with him.

X Q. 196. Yet you unhesitatingly charge him with testifying falsely in this case?

A. When he says I told him how to dispense Quin-Coco, I do.

X Q. 197. Can you recall what you did say to Mr. Reid?

A. The usual sales talk of the Quin-Coco, the consistency of the preparation; that is, the quality and the quantity of quinine it contained, and it could be handled easily and dispensed in small-necked bottles.

X Q. 198. That is all?

A. That is all.

X Q. 199. How long have you known Mr. Moseley?

A. About the same time.

X Q. 200. Is he a man of good reputation?
A. As far as I know.
X Q. 201. You also charge him with testifying falsely, do you?
A. In saying I offered to sell him Coco-Quinine I do.
X Q. 202. In any other particular?
A. And as far as telling him how to dispense it.
X Q. 203. Did you by any word or suggestion indicate to either of these gentlemen, Mr. McMillan, Mr. Reid or Mr. Moseley, that your product, Quin-Coco, could be used as a replacer or substitute for Coco-Quinine?
A. I did not.
X Q. 204. Or to any other druggist in your territory?
A. None.
X Q. 205. Did you ever make such a suggestion or intimation in reference to any other products in your line, I mean, that any
291 of your products could be used as replacers or substitutes for well-known products of other houses?
A. No.
X Q. 206. What do you consider the original liquid quinine preparation containing chocolate?
A. I have no idea.
X Q. 207. When did you first hear of Lilly's Coco-Quinine?
A. About 1907.
X Q. 208. Where?
A. Mobile.
X Q. 209. Did you ever know of another similar preparation prior to the Lilly preparation?
A. None that I know of.
X Q. 210. This was when you were in the retail drug business?
A. In the retail drug business.
X Q. 211. Did you handle it in the store where you were?
A. Yes, sir.
X Q. 212. Did the customers then sometimes call for chocolate quinine?
A. They did.
X Q. 213. Whose preparation did you understand was intended when they asked for chocolate quinine?

Mr. Rawle objects to the extreme length and irrelevancy of most of this cross-examination, and to this particular question as not proper for cross-examination.

Mr. Bradford replies that counsel for defendant closed his direct examination at 11 o'clock, and that it is now 11.32. Mr. Rawle occupied nearly an hour and a half with the witness. Counsel for plaintiff has occupied thirty-two minutes. Please read the question. (Question read.)

A. No special preparation.
292 X Q. 214. Whose preparation did you furnish?
A. We carried in stock Quin-Coco and Coco-Quinine Lilly.
X Q. 215. What store was that?

A. Sutton Brothers.
X Q. 216. In 1907?
A. Well, it might not have been in 1907, but I know later on we carried it, but I don't remember the date.
X Q. 217. Later on you carried what?
A. Quin-Coco and Coco-Quinine, Lilly, I don't know the time. We had very little sale on any chocolate quinine preparation.
X Q. 218. You remember when the Sutton store put in Quin-Coco first?
A. I do not.
X Q. 219. You remember who sold it to them?
A. No, sir.
X Q. 220. Were you the buyer?
A. I was possibly not the buyer when they first put it in.
X Q. 221. Who instructed you on what calls Quin-Coco might be sold?
A. No one.

Mr. Bradford: That is all.

Cross-examination closed.

Deposition closed.
Signature waived.

By agreement of counsel for plaintiff and counsel for defendant the signature of the witness, Clinton Gordon McCarthy, to the foregoing deposition, is hereby waived.

293 Ernest B. De Vall, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your full name, age, residence and occupation.
A. Ernest B. De Vall; present age is 29; residence, Memphis, Tennessee; occupation, salesman for William R. Warner & Company.
Q. 2. State briefly and chronologically your connection with the drug business from the start.
A. I started in the drug business in Hot Springs, Arkansas, some twelve years ago in the capacity of soda dispenser for F. J. Mobb, and after six months with him his store was sold to Charles Schneck, and was with them for several years, probably four and one-half years. I was in that store five years all told, as a soda dispenser for the first two years and then prescription clerk. After dispensing soda for probably two years I was moved into the drug department. Some year and a half after that I became registered as a pharmacist in the State of Arkansas. I was out of the drug business for some twenty-one months and went back in as manager of the Hot Springs

Pharmacy. I was in that position for some six months and went on the road for H. K. Mulford & Company. I was with them probably two years and five months in the West Tennessee territory. I was after that for six months or seven months with James S. Robinson as prescription man in the city of Memphis, retail drug business. On October the 20th or 21st, 1912, I went with the Pfeiffer Chemical Company and William R. Warner & Co., and have been in that capacity ever since as a salesman.

Q. 3. State the limits of your present territory.

A. I have what is considered Western Tennessee and the
294 Northern third of Mississippi, including the city of Memphis, Tennessee.

Q. 4. If you have previously had any different territory, state that territory.

A. Until four months ago my territory was middle and western Tennessee, including Nashville and Memphis.

Q. 5. Can you approximate the number of druggists in either of these territories?

A. In Northern Mississippi and Western Tennessee, including Memphis, I should say there are 450 or 500; that is the territory I am working at present. There is probably the same amount in middle Tennessee and western Tennessee.

Q. 6. How often do you call on these numerous drug stores per annum?

A. The cities I cover every sixty days; the smaller towns every four months.

Q. 7. To what extent do you call on doctors?

A. Limited extent only.

Q. 8. Give the proportion, if you can?

A. There is some territory where I call on the doctors regularly every four months. If I have a drive that I can make to see the doctors whereby I can see as many as four in a day, why I call on them regularly every four months. There are probably 100, maybe 125, accounts in my territory of that kind.

Q. 9. When you were taken on as salesman by Warner & Company, state what instructions you had as to your duties as salesman, and from whom?

A. I was hired by Mr. Ritayik in Memphis, and my instructions from Mr. Ritayik were that I would find the policy of the William R. Warner & Company in the back pages of the Salesman's Confidential. Mr. Ritayik actually read the instructions from the Confidential book to me. That was the only instructions that I had on the policy of the house at that time.

Q. 10. Did you receive a copy of this and have had one ever since?

295 A. Yes, sir.

Q. 11. State whether or not you have observed the rules as laid down in this "Confidential"?

A. I have.

Q. 12. Is there a rule there with regard to competitors' goods?

A. There is.

Q. 13. What is it, or what is the substance of it?

A. The substance of the rule is to think well of your competitor and never speak ill of him or his goods.

Q. 14. Anything else along that line?

A. That is all that I can recall to mind right now in reference to competitors.

Q. 15. State whether or not there is any rule on the subject of mentioning your competitor's goods?

A. Well, it is the policy of the house never to mention any competitor's goods at all.

Q. 16. State whether or not you have obeyed that rule?

A. I have obeyed it.

Q. 17. Did Mr. Ritayik travel with you, and for how long, and when?

A. When Mr. Ritayik hired me he was with me for three days and I went one week by myself and he came back to me for three days. Since that time Mr. Ritayik has been with me any way from two to three times a year.

Q. 18. When he has been with you has he visited customers with you?

A. He has.

Q. 19. On such visits do you do the selling or does he?

A. Both.

Q. 20. If a retail druggist has a prescription or a counter call for a certain preparation specifically naming the maker and he fills it with a similar preparation of a different maker, state whether or not in your opinion as a retail druggist and drug salesman that is honest business on the part of the druggist?

296 A. I think it is dishonest.

Q. 21. State what is the ethics of the retail drug business in that respect; that is, whether that is considered honest or dishonest in a retail drug business?

A. It is considered dishonest by all retail druggists.

Q. 22. If a drug salesman in soliciting a sale of a given article should suggest to a druggist that he could dispense that article on prescription or counter calls where another make was specifically named, state whether or not in your opinion this would be honest business on the part of such salesmen?

A. It would not be honest business on the part of the salesman.

Q. 23. Do you know a druggist named Gus A. Blodau, and where is his place of business?

A. I know Gus A. Blodau, of Nashville, Tennessee.

Q. 24. You remember soliciting his trade on your lines?

A. I solicited business from Mr. Blodau several times.

Q. 25. About how often?

A. At least five times a year for the last three years.

Q. 26. Gus A. Blodau, when called as a witness for plaintiff, testified that you had solicited an order for Quin-Coco, and he then testified as follows in answer to Q. 5:

"A. He gave me to understand that by the use of this preparation it would be a saving of money for me and why pay the price I did for Coco-Quinine. Naturally the impression to be made upon me was that I should use his preparation in place of Coco-Quinine."

I hand you the plaintiff's printed record, and call your attention to the answer I have just quoted, and ask you to state whether or not you said anything to Blodau which could give him such an impression, as he states you did?

297 A. I have never said anything to Mr. Blodau that would leave him under an impression as he states.

Q. 27. What was your talk with him on Quin-Coco, if any?

A. When I talked to Mr. Blodau on Quin-Coco it was on the quality of the preparation and I also brought in the price of the product. I told Mr. Blodau the quantity of quinine that our preparation contained, the smoothness of it, that he would be able to pour it into very small-necked bottles, it would give absolute satisfaction where any quinine was necessary. My talk also to him was the question of customers that wanted preparations for malaria and bad colds and things of that nature where Quin-Coco could be sold.

Q. 28. In what words did you first call his attention to your product; that is, what did you say?

A. Well, I couldn't say the exact words that I gave Mr. Blodau on talking to him of that item, but the usual method of selling any of my items is from a sample. I had a sample of Quin-Coco in my pharmaceutical sample case and called his attention to the merits of the item.

Q. 29. State whether or not you began reference to this item by asking Blodau, as he testifies you did, if he "was using Coco-Quinine." to which he replied, "Yes"; is this correct?

A. I did not.

Q. 30. State whether or not you in that interview were soliciting his trade of your entire line?

A. I was.

Q. 31. How long did you spend there with him?

A. I usually spent from forty-five minutes to three hours in his store.

Q. 32. Going over your entire line?

A. The entire line, yes, sir.

Q. 33. Do you know William M. Scott, and if so, where is he located?

A. I knew Mr. Scott of Memphis, but I don't know his

298 present whereabouts. He was not a retail druggist when I knew him in Memphis. He was a clerk in a retail drug store when I knew him in Memphis.

Q. 34. William M. Scott, when called as a witness for plaintiff, testified as follows, as a part of his answer to Q. 2:

"Mr. De Vall, representing William R. Warner & Company, called on me either in last September or October and stated that Quin-Coco could be dispensed and sold as Coco-Quinine, Lilly's. In De-

cember the 24th, 1914, at that time, I was manager of Lavison's Pharmacy, McLemore & Patton Sts., Memphis, Mr. De Vall called on me and stated that I could put up and dispense Quin-Coco on specified prescriptions for Lilly's Coco-Quinine."

Please state what you have to say of the trutfulness or untruthfulness of this statement just quoted. I hand you the plaintiff's printed record with the quoted passage marked.

A. I called at Lavison's Pharmacy December 23d of 1914. Mr. Scott was manager for the time being, Mr. Lavison being out of town for a few days on account of ill-health. I did not urge him to buy Quin-Coco and did not mention Eli Lilly's product. He states here that in September or October I called on him. I did not. I don't know where he was in business at that time.

Q. 35. Do you know whether Lavison's Pharmacy had been handling Quin-Coco before December 23d, 1914?

A. They had.

Q. 36. How do you fix the date specifically as December 23d, 1914?

A. It was very near Christmas and I had been trying to see Mr. Lavison previous to that and his health would not permit my seeing him, so I heard he had a manager out there that was in position to talk business, so I went out to see him.

299 Q. 37. How do you fix the exact date?

A. I keep a record of all sales with dates. I refreshed my memory on that date.

Q. 38. Did you solicit William M. Scott's trade when he was in the retail drug business at 902 Chelsea Avenue, and before he went to Lavison's?

A. No, sir.

Q. 39. State whether or not you ever solicited William M. Scott's trade when he was in the drug business by himself?

A. I never did.

Q. 40. Mr. Scott further testified in answer to X Q. 35:

"A. Why he first came to me at 902 Chelsea Avenue, spoke to me in a friendly way, and asked me if I would not give him some business and made the statement that he was glad to see me in business for myself and believed that was a good stand and wanted to sell me a line of Warner's preparations, non-secrets, etc., and remarked, 'Scott, you know we have the Quin-Coco which is the same as Lilly's Coco-Quinine, sold to you by Winchester; shall I show you the preparation or have you ever seen it? You can use it on specified prescriptions for Lilly's Coco-Quinine. I have the old reliable line of non-secrets. Will come out to see you in a very short time. Make me out an order and I will give you satisfactory terms. Hoping you will do well.' That is all the conversation that I recall."

What have you to say as to the truthfulness or otherwise of this testimony of Scott's? I hand you the plaintiff's printed record and point out the words I have quoted.

A. I never saw Mr. Scott at 902 Chelsea Avenue. I never had any such conversation with him as that.

Q. 41. Scott further testified in answer to X Q. 26:

"A. If I may be allowed to express this, I don't think Mr. De Vall intended that reflection upon me as according to Mr. De Vall's
300 statement so many were using and substituting this so-called Quin-Coco, and my opinion was that Mr. De Vall wanted to let me in on a close substitute. That is the way I felt about Mr. De Vall's suggestion to me in regard to Quin-Coco."

Read the passage in the plaintiff's printed record, which I hand you, and state what you have to say in regard to this statement of Scott's?

A. I never had any such conversation as that with Mr. Scott.

Q. 42. Mr. Scott testified:

"X Q. 27. But have you not testified that he suggested to you that you should use Quin-Coco in prescriptions calling for Coco-Quinine?

A. He did not suggest that I should use them. He said it could be done, and was being done.

X Q. 28. Didn't he mean that you could do it?

A. I didn't take it that way. I took it that it could be done if I was disposed to do so, that is the impression the interview had on me."

What have you to say as to these statements of Scott, and whether they are true or not true?

A. I have never had any conversation with Mr. Scott along that line whatever.

Q. 43. State whether or not you suggested to Scott that he should use Quin-Coco in prescriptions calling for Coco-Quinine?

A. I did not.

Q. 44. Scott testified:

"X Q. 30. Haven't you said that De Vall's suggested to you that you could use his Quin-Coco in prescriptions calling for Coco-Quinine?

A. No, sir, not me. That it could be used. He did not specify me.

X Q. 31. Wasn't he talking to you at the time?

301 A. Yes, sir, he was leaving me under the impression that it could be done and was being done by others."

State whether or not you made such a suggestion to Scott as he states or any suggestion carrying the same meaning?

A. I would say I had no conversation like that with Mr. Scott.

Q. 45. Scott further testified as follows in answer to X Q. 47:

"A. Why Mr. De Vall called on me at the second interview. I was then manager of Lavison's Pharmacy, McLemore and Patton Streets. Mr. De Vall—I don't recall the exact conversation that took place previous to his mentioning the Coco-Quinine proposition. Then Mr. De Vall said to me that this Quin-Coco of theirs was being used and substituted, to use his words, for Lilly's Coco-Quinine so

by Mr. Winchester. I can't recall much of that conversation at the last part of this answer.

X Q. 48. Can't you give the words he used with reference to his efforts to sell you Quin-Coco?

A. Yes, he left the impression upon me that it was being used and substituted for Lilly's Coco-Quinine."

What have you to say as to the truthfulness or untruthfulness of this testimony of Scott?

A. I had no such conversation with Mr. Scott on that subject.

Q. 46. State whether or not you said to Scott what he testified that you did say to him?

A. I did not.

Q. 47. State whether or not you have a regular and settled method of introducing a particular preparation to a retail druggist when you are going through your line, and if so, what it is, illustrating by Quin-Coco?

302 A. I have no set rule for selling every person. I have no set argument that I use.

Q. 48. How do you introduce Quin-Coco in practice?

A. I introduce Quin-Coco by the quality of the item and let the quality of our item sell it. I give suggestions to the trade in numerous ways that Quin-Coco could be sold by them.

Q. 49. State whether or not in soliciting an order for Quin-Coco you begin by mentioning a competitive article?

A. I never under any circumstances mention a competitive item on anything unless the man whom I am trying to sell first brings up that point.

Q. 50. You have said that you are in the habit of suggesting to druggists ways in which they can sell Quin-Coco? What are those ways?

A. Well, in my territory there is a good deal of malaria. I suggest that they sell it for malaria, that it is a palatable way of giving quinine, they could sell it for colds, coughs, they could sell quinine in our preparation of Quin-Coco wherever quinine is indicated; in any disease that it might be indicated Quin-Coco is certainly indicated.

Q. 51. On what sort of calls over the counter?

A. Quin-Coco, chocolate syrup of quinine, or sweet quinine, or syrup of quinine.

Q. 52. You have been a retail druggist and a drug salesman. State whether or not a druggist can by personal effort create a market for a particular preparation.

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. 53. By what efforts?

Mr. Bradford: Same objection.

A. By constant thought of an item and constant push, selling talks.

303 Q. 54. With whom?

Mr. Bradford: Same objection.

A. Anyone who might possibly be a customer or user.

Q. 55. Do you know of instances in which this has been done?

Mr. Bradford: Same objection.

A. I do—on all items, you mean?

Q. 56. Name some instances in which druggists have been successful in creating a market for a given preparation or a particular make of preparations; give the line of preparation.

Mr. Bradford: Same objection.

A. Why, we have a line of package goods, Pfeiffer Chemical Company make, Hobson items. Well, there are several items there the druggist builds up his own business on those goods. They are not advertised at all to the laity. By constant selling talks and selling the goods he will build himself up a business on a quality line.

Q. 57. Can you give me the names of any other similar lines?

Mr. Bradford: Same objection.

A. Yes, there are several. Take the Nyal lines, for instance, the Penslar lines, the Dike lines.

Q. 58. How are they built up?

Mr. Bradford: Same objection.

A. By the push and salesmanship of the druggist.

Q. 59. You mean retail druggists?

Mr. Bradford: Same objection.

A. Retail druggists, yes, sir.

Direct examination closed.

304 Cross-examination.

By Mr. Bradford (not waiving objections):

X Q. 60. During what period were you a traveling salesman for H. K. Mulford & Company?

A. January the 1st, 1910, until probably May—April or May of 1912.

X Q. 61. And what territory did you cover?

A. Western Tennessee exclusive of Shelby County.

X Q. 62. You have continued to have the same territory since being with William R. Warner & Company, have you not?

A. Yes, sir, with additions.

X Q. 63. What territory did Mr. Ritayik cover with you during his first visit?

A. We went from Memphis, Tennessee, to Milan, on the Louisville & Nashville Railroad.

X Q. 64. Solicited trade from all the drug stores in the towns on this line?

A. We did.

X Q. 65. Also doctors?

A. Well, I am not positive that at that time we did solicit doctors.

X Q. 66. In referring to calls on doctors, you mean dispensing doctors or all doctors?

A. Dispensing doctors.

X Q. 67. In October, 1912, did Mr. Ritayik read to you the matter in the back of the Salesmen's Confidential that you have referred to?

A. He read part, if not all. I won't say he read it all.

X Q. 68. Can you recall the substance of what he read?

A. No. The thing that Mr. Ritayik impressed on me was that I should read it myself.

X Q. 69. You have had a copy of this Confidential from that time to the present?

A. I have.

305 X Q. 70. Have you the original copy that Mr. Ritayik presented to you in October, 1912?

A. No, sir; I have not.

X Q. 71. You know where it is?

A. Well, those things are reprinted every once in a while.

X Q. 72. And the house exchanges the new edition for the old, I presume?

A. Yes, sir.

X Q. 73. Have you read the matter on pages 86 and 87 of the present edition of the Salesmen's Confidential?

A. I have.

X Q. 74. And does it correspond with what Mr. Ritayik read to you at that time in October, 1912?

A. It does.

X Q. 75. When did Mr. Ritayik make the last trip with you—his last trip with you?

A. In August or September of this year.

X Q. 76. What territory did you cover then?

A. Two days adjacent to Nashville—no, one day. He was with me only one day and it was near Nashville.

X Q. 77. You remember the stores you called on?

A. No, sir; I do not.

X Q. 78. You remember the particular territory you covered?

A. I do not; I couldn't say positively; I know it was near Nashville.

X Q. 79. You remember any trips he made with you in 1914?

A. Yes, he made trips with me in 1914—two or three.

X Q. 80. Do you recall the territory that you covered on any of those trips?

A. We made some territory on the N. C. & St. L. R. R., I think Jackson on one trip. We made some territory in Middle Tennessee and some territory south of Nashville on the N. C. & St. L. road.

X Q. 81. Won't you name some of the smaller towns that
306 were included in this trip?

A. Well, there was Bellbuckle, Tennessee, Shelbyville, Christiana, Springfield, Green Brier. We probably made some more territory, but that is all I am positive of.

X Q. 82. You have from 450 to 500 drug stores and from 100 to 125 dispensing doctors to call on in your territory, as I understand from your testimony?

A. I never kept a record of these; that was just a guess on my part.

X Q. 83. And you show each of these customers your entire line?

A. All druggists I show the entire line to, yes, sir.

X Q. 84. You spend from forty-five minutes to three hours with each druggist as you did with Mr. Blodau?

A. If I can talk business at all it takes me from forty-five minutes to three hours to do it.

X Q. 85. Are you sure that you never mentioned a competitor's product until the subject is first mentioned by your customer?

A. In talking to a customer, yes.

X Q. 86. Won't you state again how you introduce the subject of Quin-Coco to your prospective customers?

A. I have never used any one item in our list as a special item. I sell most everything in a general way. In selling Quin-Coco I lay heavy stress on the quality of the item, its thinness, the amount of quinine it contains, the fact that it does not ferment or will not lump.

X Q. 87. Do you say anything about the demand for this product to your customers?

A. Those that have a demand for it I don't have to mention it. Certainly if a man has never handled our Quin-Coco, he has got to create a demand for it. I lay a good deal of stress, however, on the amount of it that could be sold if he would get behind it properly.

X Q. 88. What product do you push it against?

A. Push it against? I push it as an item, not against
307 anything. In fact, I don't, as I say, lay special stress on Quin-Coco. It gets no more push from me than any other item in the pharmaceutical line.

X Q. 89. Have you ever suggested to any retail druggist in your territory that he could use any of your products or pharmaceuticals when any well-known product or pharmaceutical of a competing house was called for?

A. Never.

X Q. 90. Have you ever suggested to any retail druggist in your territory that any of your products are the same as certain products of other houses?

A. No, sir.

X Q. 91. Is Mr. Blodau a man of good business reputation?

A. He is.

X Q. 92. Is he a man you think would be liable to misrepresent matters that he is called on to testify concerning under oath?

Mr. Rawle: Objected to as immaterial.

A. I don't think that Mr. Blodau would misrepresent anything intentionally.

X Q. 93. Do you think his testimony on behalf of the plaintiff in this case was given unintentionally.

A. Well, Mr. Blodau's testimony there claims that I urged him to use Quin-Coco in preference to some other items, was mistaken, and I am certain that he didn't intend to lay that kind of stress on his testimony.

X Q. 94. You did say to him, however, that he could save money by buying your preparation?

A. Yes, sir.

X Q. 95. In competition with what other product?

A. I don't know what items he is handling at the present time. I know that he has handled Eli Lilly's Coco-Quinine and probably some others, but I didn't name any special preparation when I said that he could save money.

308 X Q. 96. Wasn't your comparison of the price of your product with the price of Coco-Quinine, Lilly, in your talk with Mr. Blodau?

A. Well, my talk with Mr. Blodau there—I had several with him, you know in selling him goods, and I don't remember of ever—in fact, I am certain that I have never mentioned any competitive item to Mr. Bloudau in that way.

X Q. 97. You are certain that you didn't compare the price of your product, Quin-Coco, with the price of the Lilly product, Coco-Quinine, in seeking to sell him Quin-Coco?

A. I probably mentioned the price of my item, but inasmuch as he never had any business on our item I never mentioned saving him any money. If he could sell our item, why he would certainly reap a nice profit from it.

X Q. 98. You know of any other similar preparation on the market selling for a higher price than yours except Coco-Quinine?

A. Yes, sir.

X Q. 99. Which?

A. H. K. Mulford.

X Q. 100. Did you meet the Mulford preparation in competition with Quin-Coco in your territory?

A. Yes, sir, they sell chocolate-quinine.

X Q. 101. Did you sell it for them when you traveled for them?

A. I have sold it for them, yes, sir.

X Q. 102. Did you say anything to Mr. Blodau about the formulae of the preparation, Quin-Coco?

A. Yes, I made the point that it had two grains of quinine sulphate to each 90 minims.

X Q. 103. Did you tell him your house had a man that formerly worked for Lilly & Company?

A. No, sir, I never had any knowledge that a Lilly man ever worked for the house.

309 X Q. 104. And you didn't say to him that other druggists were using your product, Quin-Coco, for Coco-Quinine?

A. No, sir.

X Q. 105. You say you never called on Mr. Scott except one time,

on December 23rd, 1914, while he was temporarily in charge of the Lavison Pharmacy?

A. No, sir, I didn't say that. I said that I called upon him once there. That I never did call upon him at 902 Chelsea.

X Q. 106. What other place have you called on him?

A. At Brownsville.

X Q. 107. What did you say to him in reference to Quin-Coco at Brownsville?

A. Didn't even open my sample case, never mentioned anything.

X Q. 108. Did you have any conversation with him at all?

A. Yes, sir.

X Q. 109. Do you remember the conversation?

A. Yes, sir, I wanted to get an eighty-dollar past due account I was there to collect and not to sell.

X Q. 110. That was the first time you had met Mr. Scott?

A. First time I ever saw him, yes, sir.

X Q. 111. You remember when that was?

A. It was either in the fall of 1912 or may be the early part of 1913, I would not say positively, about that date. It might have been in '13—1913.

X Q. 112. Are you certain that your day, December 23rd, 1914, is correct, and Mr. Scott's date of December 24th, 1914, is a mistake?

A. Well, my records show that I got his order on December 23rd, 1914.

X Q. 113. Could it be possible that you actually called on the 24th, and dated your order on the 23rd, in order to complete the 23rd day's business for any purpose?

A. No, sir, my orders are usually in the post office every night.

X Q. 114. Do you ever make a mistake?

A. I do.

310 X Q. 115. Did you ever in showing your sample of Quin-Coco to a retail druggist compare it with Coco-Quinine in his stock?

A. No, sir.

X Q. 116. You never compared your product with the Lilly product in seeking an order from any customer?

A. No, sir.

X Q. 117. What is the first preparation, liquid preparation, of quinine sulphate containing cocoa that you ever heard of?

A. I think Coco-Quinine was. However, I am not positive about that.

X Q. 118. Isn't it true that customers frequently ask for Coco-Quinine by the name chocolate quinine.

A. Well, for that I can't say. When they ask for chocolate quinine I can't say that they are asking for Coco-Quinine. There are a lot of people, however, that call for chocolate quinine.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 119. State whether or not you ever said to Blodau that he could save money by selling Quin-Coco?

A. I told Mr. Blodau that in pushing chocolate or syrup of quinine to his trade that ours was a pretty good price. I don't known that I ever went into details, to figure any great saving, or anything like that for him.

R. D. Q. 120. Was it any part of your duty as a salesman to collect this unpaid bill from Scott?

A. It was.

R. D. Q. 121. How often did you call on him for the purpose of collecting it?

A. One time only.

R. D. Q. 122. You know if it has been paid?

A. It has not.

R. D. Q. 123. Has it been charged off?

311 A. Charged to profit and loss, yes, sir.

R. D. Q. 124. You know the amount?

A. It was approximately eighty dollars.

R. D. Q. 125. If there is any difference in your testimony on the notes as to whether you did or did not tell Blodau that he could save money on Quin-Coco, state now which is the fact?

Mr. Bradford: Objected to as improper.

A. We had quite a talk about that business, which could be built up, of building up a business on Quin-Coco, and I pointed out the profits to him that could be made by handling and pushing the item, but as to mentioning any saving I don't know for certain that that was brought in.

Redirect examination closed.

Recross-examination, without waiving objections.

By Mr. Bradford:

R. X Q. 126. Why are you now seeking to modify statements which you have heretofore made in reference to this subject?

Mr. Rawle: I object to that question in form, and in fact; the witness is not seeking anything of the sort. He is answering the question I put to him.

A. Extra money made is certainly money saved. If he could build up a business on Quin-Coco, there is certainly an extra amount of profit to him. He might probably sell him quinine in a syrup instead of tablets, by making a 25c. sale instead of a 10c. sale.

R. X Q. 127. Didn't you know at the time that Mr. Blodau was handling Coco-Quinine?

A. He might possibly have mentioned that to me. Of course, I am not certain about that.

R. X Q. 128. Didn't you have access to his stock of pharmaceuticals?

312 A. No, his pharmaceuticals are in the rear of his store that is, in the rear of the prescription case. We did business out in front on his wrapping counter.

R. X Q. 129. Isn't it your custom to go behind the druggist's prescription counter?

A. No; I do that with some customers, with customers who are probably a little bit more friendly towards me than Mr. Blodau.

R. X Q. 130. You didn't go behind Mr. Blodau's prescription counter?

A. I don't remember of ever going behind his counter, and I know that I haven't been back there to look at his stock.

R. X Q. 131. Are you willing to say that Mr. Blodau's statement that you told him that he could save in price over Coco-Quinine is untrue?

A. I tried to sell Mr. Blodau Quin-Coco at the regular price and if Coco-Quinine was brought in it was not brought in by me.

R. X Q. 132. You never compared the price of your product, Quin-Coco, with the price of Coco-Quinine?

A. If the price of Coco-Quinine was mentioned, it was mentioned by Mr. Blodau.

R. X Q. 133. Did you have as a part of your outfit a document which has been called in this testimony a "Blue List?"

A. I don't know what you have reference to there.

R. X Q. 134. I show you a document and ask you if you recognize it?

A. I don't believe I have ever seen one of these. I never had one of these in my possession any way.

R. X Q. 135. Anything like it?

A. I had nothing in the way of a list there, except price lists.

R. X Q. 136. You spoke of Mr. Blodau in a way that would indicate that he may not be very friendly with you, is that true?

A. Not especially friendly, no, sir.

R. X Q. 137. Is there any unfriendliness between you?

A. No, sir, I don't think that there is.

313 R. X Q. 138. Does he buy goods from you?

A. Yes, he has bought goods from me ever since I have been with the house.

R. X Q. 139. Always treat you cordially and friendly?

A. Yes, sir.

R. X Q. 140. Are there any unpleasant relations between you and Mr. Scott?

A. None whatever.

Recross-examination closed.

Re-redirect examination.

By Mr. Rawle:

R. R. D. Q. 1. State whether or not you have had intimate relations with either Blodau or Scott?

A. No, sir, I have not. My association with them has been purely business.

R. R. D. Q. 2. What exactly do you mean by "friendly relations?"

A. Well, there are some people in my territory whom I have been calling on a good deal longer than I have on Mr. Blodau.

R. R. D. Q. 3. And know them better?

A. And know them better and more intimately acquainted with them, and they are people I can get next to, get closer to, than I could to Mr. Blodau.

R. R. D. Q. 4. Or Mr. Scott?

A. I have only seen Mr. Scott three times in my life, knowingly.

Re-redirect examination closed.

Deposition closed.

ERNEST B. DE VALL.

Sworn to before me the 8th day of December, A. D. 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk U. S. Dist. Court, East. Div.,
Eastn. Jdcl. Dist. of Missouri.

At this point a recess was taken to 2:30 P. M., December 8th, 1915.

314 Pursuant to adjournment as before stated, at 2:30 P. M., December 8th, 1915, the further taking of these depositions was had as follows:

WILLIAM C. KERSTANN, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your full name, age, residence and occupation?

A. William C. Kerstann; thirty-six; Memphis, Tennessee; Assistant Manager of William A. Webster Company, manufacturing chemists with their business and plant at Memphis, Tenn.

Q. 2. When did you go into the drug business at Memphis, Tennessee, first?

A. In the Fall of 1906, with the Webster-Warnock Chemical Company, manufacturing chemists. I was superintendent of the factory.

Q. 3. Did you have an interest in the business?

A. I had no interest in that business. That was in 1910.

Q. 4. Did you help to organize it?

A. Not in 1910. I helped to organize the William A. Webs Company, Memphis, Tennessee, manufacturing chemists.

Q. 5. Did you have an interest in the company?

A. I have an interest in the company.

Q. 6. And are general manager of the plant?

A. Assistant manager.

Q. 7. State whether or not the first of these two concerns, t Webster-Warnock Company put out a chocolate quinine preparati and if so, when?

A. They were putting it out when I left there, and I presume th are still putting it out.

315 Q. 8. What is its general make-up?

A. The general make-up was Yerba Santa, Licorice, po dered cocoa, sugar and aromatics with quinine sulphate, two grai to the fluid dram.

Q. 9. Was that listed in your catalogue?

A. It was not.

Q. 10. Was that listed in your catalogue with the Webster-Wa nock Company when you left there?

A. It was not.

Q. 11. Had it been put out at that time?

A. Yes, I believe it had been put out.

Q. 12. To what extent had it been sold throughout the country

A. Not very greatly because there was no great demand exce when a salesman sold it.

Q. 13. What was the name of the preparation on the market?

A. Chocolate Syrup Quinine.

Q. 14. Did your second company, the William A. Webster Com pany put out a chocolate-quinine preparation?

A. Yes.

Q. 15. When?

A. It was put out about the time we started, included in ou general list.

Q. 16. What was the name of that?

A. Chocolate Syrup Quinine.

Q. 17. What is the general make-up of that?

A. The general make-up is similar to the form I have just stated previously.

Q. 18. Is it listed in your catalogue?

A. It was listed in our catalogue.

Q. 19. You have salesmen on the road selling it?

A. Yes, we do.

Q. 20. All over the country?

A. No, not all over the country, we merely work the southern states.

Q. 21. State what is the value of Cocoa in this preparation?

316 A. My experiments have proven conclusively cocoa is a valuable aid both in suspending the crystals of quinine sul phate and helping to disguise the unpleasant bitterness of quinine. I have always felt a certain amount of the chocolate syrup coate

the crystals of the quinine sulphate. When introduced in the sulphate in this way, it assists in allaying the bitter taste of the quinine, becoming predominant. I have also found that it was necessary to use herbus licorice, some saccharine to assist in disguising the taste of quinine, very nearly complete.

Q. 22. Also Vanilline?

A. Yes. We use that. I have the formula with me as far as that is concerned.

Q. 23. Do you usually put vanilline in cocoa and chocolate?

A. Vanilline is used to bring out the aromatic flavor of cocoa.

Q. 24. Is that usual to mix vanilline in small quantities with cocoa to bring out the aromatic flavor of the cocoa?

A. It is not usual except in this particular preparation I presume. I had no occasion to use it in other preparations of this kind.

Q. 25. Will you state whether or not the crystals of sulphate are held in suspension in this preparation?

A. They are held in suspension. If they were not held in suspension the bitter taste of quinine could not be disguised.

Q. 26. State whether or not in your opinion you can make a satisfactory pharmaceutical preparation if you omitted the cocoa from it?

A. I could not.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 27. Are you a graduate of pharmacy?

A. No, sir, I am not.

317 X Q. 28. Are you a graduate in chemistry?

A. I am not; I am a practical chemist.

X Q. 29. What do you mean by a practical chemist?

A. I mean that continually working under the supervision of Professor F. S. Hereth, who was a professor of pharmacy in the Chicago College of Pharmacy. During the time I was employed by the Searle & Hereth Company I worked under Professor Hereth's personal supervision for twelve years and also in the pharmaceutical business under his direction.

X Q. 30. When did you leave the employ of the Searle & Hereth Company?

A. In 1906.

X Q. 31. When did you begin your employment with the Webster-Warnock Company?

A. August 1st, 1906.

X Q. 32. When did you leave the employment of the Webster-Warnock Company?

A. It was either 1909 or 1910; I am not sure. I think it was 1910.

X Q. 33. Just immediately prior to your forming the William A. Webster Company?

A. Yes.

X Q. 34. Did you leave the Webster-Warnock Company for the purpose of becoming one of the organizers of the William A. Webster Company?

A. Yes, I did.

X Q. 35. How long prior to leaving the Webster-Warnock Company was it that they put out the chocolate-Quinine preparation you have reference to?

A. I have no records of it. I can merely state from memory, and it seems to me that they put it out just for a short time prior to the time I left there.

X Q. 36. Who prepared their preparation for them?

A. I prepared it for them.

X Q. 37. Who worked out the formula for it?

A. I made up the formula.

X Q. 38. Where did you get the formula?

318 A. I worked on it.

X Q. 39. From what?

A. From various experiments.

X Q. 40. With what?

A. My original experiments. I used the preparation that the Searle & Hereth Company put up that they called "Quinomel." It was as a basis for this formula which we now have spoken of.

X Q. 41. Was Quinomel used in the preparation of the Webster-Warnock Company that you have reference to?

A. Quinomel was not, but partly the constituents were, such as Yerba-Santa.

X Q. 42. Did you have anything else to aid you in preparing this formula?

A. Fenner's formula.

X Q. 43. What did you find in Fenner's formula that aided you?

X Q. 44. Fenner's formula states that cocoa or chocolate is used in medicine to disguise the unpleasantness of some medicines, as near as I can remember the wording of it.

X Q. 45. Did you have any of Lilly's product, Coco-Quinine?

A. Yes.

X Q. 46. At the time of your experiments?

A. Yes.

X Q. 47. Did you analyze it?

A. No, sir.

X Q. 48. Did you seek to duplicate it?

Mr. Rawle: Question objected to as not proper cross-examination and as immaterial.

A. Certainly.

X Q. 49. Wasn't the purpose of the preparation to be put out as a replacer for Coco-Quinine, Lilly?

Mr. Rawle: Same objection and because the word "replacer" is not apparent or necessarily known to the witness.

319 A. I do not believe it was ever intended to be a replacer. It was offered as a competitive article.

X Q. 50. What first suggested to you the advisability of putting out such a preparation?

A. Well, we were always more or less interested in discovering a preparation which would disguise the bitter taste of quinine. For this purpose, this Quinomel which I have spoke of had always previously been used.

X Q. 51. You were familiar with the success of Lilly's preparation, Coco-Quinine, as a liquid quinine preparation at that time, were you not?

A. Yes.

X Q. 52. You knew that there was a large demand for it in the drug trade?

A. I have no way of knowing how much demand there was.

X Q. 53. You knew it was a good selling item?

A. I would not say that because I do not handle the preparations, consequently I would not know.

X Q. 54. Did Mr. Hereth give you any information in reference to the product?

Mr. Rawle: Objected to as hearsay.

A. I do not recall whether he did or not. It is too long a time ago. I never thought of anything coming up in this record, so consequently kept no records as to whether he gave me any instructions or not. What I did, I did of my own accord. I was only interested in a pharmaceutical preparation, and it was my duty to do the experimental work entirely.

X Q. 55. Is the formula used by William A. Webster Company the same as was used by the Webster-Warnock Company?

A. It is not. The formula has been improved upon from time to time.

X Q. 56. Under your supervision?

A. Under my supervision, yes.

320 X Q. 57. What is the name of the preparation put up by William A. Webster Company?

A. Chocolate-Syrup-Quinine.

X Q. 58. Is it an easy matter to work out a working formula for the preparation of pharmaceutical products such as Coco-Quinine?

A. It is not an easy matter.

X Q. 59. How long did you require in your experiments before you reached a satisfactory result?

A. I never kept an accurate record; I would not say. I will say I spent a great deal of time on it.

X Q. 60. Covering a period of how many years?

A. Well, the past five years there has been time spent by me as well as our chief Chemist, who also has worked on the formula to make a more satisfactory preparation.

X Q. 61. Who is your chief chemist?

A. Mr. C. F. Kessler.

X Q. 62. In what particular was your preparation unsatisfactory?

A. At one time we had trouble. The preparation became too thick from the use of chocolate, and the quality of course was cut down or added to as the case demanded.

X Q. 63. The ingredients remained the same?

A. The ingredients remained substantially the same.

X Q. 64. Has vanilline any medicinal value in preparation?

A. It has no medicinal value in this preparation on account of the comparatively small quantity used.

X Q. 65. It does, however, affect the flavor or taste of the preparation to some extent, does it not?

A. It does.

X Q. 66. Are you positive that no other agent than cocoa can be used in preparing a liquid quinine of sulphate medicine?

A. I am not positive about that.

321 X Q. 67. Did you ever make any experiments with other syrups than cocoa?

A. I did.

X Q. 68. What did you use?

A. I used as a base the formula of Quinomel which I spoke of before. This preparation made a fairly tasteless preparation but it was not tasteless enough to satisfy the trade.

X Q. 69. What other syrups did you use as a base in your experiments, if any?

A. No other syrups were used.

X Q. 70. What were your duties while you were in the employ of the Searle & Hereth Company?

A. I was manager of the elixir and syrup department.

X Q. 71. The manufacturing department?

A. Yes.

X Q. 72. Were any experiments made in the Searle & Hereth Company while you were with them to bring out a similar preparation one of similar character?

A. As near as I can recall I did some small amount of experimenting but the experiments were not completed when the Searle & Hereth Company was absorbed by, I believe, the Pfeiffer Chemical Company, or at that time, becoming associated with it, and the matter was then dropped as near as I can recall.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 73. During any part of your work on this formula, state whether or not you were marketing the product at the same time and keeping up your experiments?

A. Yes, we were. We were trying to make a better preparation than we had been formerly; of course, we were trying to improve upon it at all times.

R. D. Q. 74. State whether or not by the word formula you include not only the ingredients of your preparation but the method of making it?

A. Well, the formula, what is meant in pharmacy, are the ingredients, compounding of the formula, that requires pharmaceutical skill. Whether that is embraced in the formula of course I cannot state.

WILLIAM C. KERSTANN.

Sworn to before me the 8th day of December, 1915.

EDWIN W. TOBIN,
Deputy Clerk of the U. S. District Court, Eastn. Div., Eastn. Judicial Dist. of Missouri.

EUGENE R. BROWN, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and present occupation?

A. Eugene R. Brown; thirty-six; St. Louis, Missouri; 740 North Euclid Avenue; Traveling for William R. Warner & Company, as a Drug Salesman.

Q. —. State your course of life in the drug business beginning at the start and coming on down to date.

A. Well, I graduated in medicine at the Washington University, St. Louis. I studied there four years and I practiced five years and then went on the road for H. K. Mulford & Company, manufacturing druggist, pharmaceutical house; Philadelphia. I was with them six months; then with Abbott Alkaloid Company, Chicago, also pharmaceutical manufacturers; I was with them two years; I then went with the Webster-Warnock Company, Memphis, Tennessee; I was with them three years. They are also pharmaceutical manufacturers, as drug salesman. I then became sales manager and was director and stockholders of the Pullen, Richardson & Company, St. Louis, chemists, also pharmaceutical manufacturers, and was only with them three months when we sold out to the Allen Pfeiffer Chemical Company of St. Louis. I then went with the I. Samelson Company of Memphis, Tennessee, Cigar Jobbers. I was with them twenty-one months, and I left them to go into the drug brokerage business for myself. I was in the drug brokerage business about eight months and the European war came up and I could not have anything to sell. I handled a line of imported drugs and drug sundries and then I came with the William R. Warner Company in August of 1914 and I have been traveling for them in Southern Missouri and Central Missouri since that time.

I never worked any territory in St. Louis or St. Louis County. I has been outside of St. Louis. I am a registered druggist in Missouri.

Q. 4. About how many druggists are there in your territory, a proximately?

A. One thousand.

Q. 5. How often do you make your visits to these drug stores year?

A. Three months and a half between trips, on an average.

Q. 6. On what proportion of the doctors in your territory do yo call?

A. I endeavor to see all the dispensing physicians in my territor every trip, that is the three times a year.

Q. 7. If a retail druggist has a prescription or a call over th counter for a given preparation made by a specified drug house an he fills that with a similar preparation made by a different hous state whether that is honest business on the part of the druggist?

A. Absolutely no.

324 Q. 8. State whether or not you express the ethical standar of the drug business?

A. Yes, I believe I do, it is among all druggists and doctors, it i considered unethical to substitute.

Q. 9. Is that your personal opinion of the morals?

A. It is.

Q. 10. If a drug salesman offered a given product to a druggis suggested to him that he could dispense that product when a similar product was specified in a prescription or a call over the counter of a different make, state whether or not that is honest business on the part of the salesman?

A. It is a violation of all rules of right or wrong it looks to me.

Q. 11. Did you ever do it?

A. I never have.

Q. 12. Do you know a druggist named James A. Kinder, and if so, state where his drug store is?

A. His drug store is in Cape Girardeau and he is a member of the firm of Miller & Kinder on Good Hope Street, and he does the buying for that store.

Q. 13. Have you solicited his trade, and if so, how often?

A. I have called on him on my regular trips to Cape Girardeau ever since I have been in the territory; that is about five times that I solicited his business.

Q. 14. Does Kinder carry Quin-Coco in stock?

A. No, sir.

Q. 15. James A. Kinder when called as a witness for the plaintiff on page 137, testified as follows:

"Q. 12. What did Mr. Brown state, if anything, as his reasons for expecting you to sell Quin-Coco, if you had no calls for it?

A. He stated that it had been and was being successfully used wherever Coco-Quinine was having a good sale; that they were identical preparations and could not be distinguished.

Q. 15. Did he or did he not explain to you how you could

325 use or sell Quin-Coco and if so what did he say?

A. He simply suggested that we could use it wherever there

was a demand for Coco-Quinine, and that it could not be told from Coco-Quinine."

I hand you the plaintiff's record in this case and call your attention to the questions I have dictated, and ask you to state whether those statements of Kinder are true or not true?

A. They are not. I have read it over. The question twelve, I have read, the question and answer that he said I made, there is a qualification in that for this reason, that in my talk to him I never suggested a substitution to him. I told him that we did not detail the doctors on Quin-Coco; that our house does not make a practice, and I suggested to him, we have a good preparation here with two grains of quinine sulphate to the teaspoonful, if you show this preparation to physicians I believe that you can get them to use that preparation because there is not a superior preparation to that product on the market. So the way this language was brought out, there is nothing said in regard to the physician at all. That is the way my talks were made. I think he said something about "Well, I am getting no call for your product and I said that is for you to do. I said we do not detail products. We make the prices on products that should be an inducement to the druggist to detail the doctor. We cannot afford to spend two or three days every time I come to Cape Girardeau, and if I did, we would have to charge more for the product and the man who buys the goods will have to pay the freight. My talk with him was entirely on the physician, whether I am calling on the dispensing physician; I talked straight from the shoulder to him. I showed him our product. I said it will pour in and out of a one-ounce bottle and let him judge for himself where he wanted to buy. That is up to him. I have told a great many doc-
326 tors you have brains, you have graduated in medicine; having brains you have a right to practice; if a preparation comes up to the two grains per spoonful strength, it will pour readily, that is what you want. I was in a doctor's office and I poured it in a one-ounce bottle and after that he did not buy any other product, chocolate-quinine, but ours.

Q. 16. Do you know Joseph N. Wolsey, and where is his place of business?

A. He is located in Cape Girardeau; I don't know where his store is located. His store is known as the City Drug Store.

Q. 17. Did you ever solicit his trade?

A. Yes.

Q. 18. How often?

A. On my regular visits, about three times a year.

Q. 19. Did he stock Quin-Coco?

A. I believe that he did.

Q. 20. Did he buy any from you?

A. No, I do not think he did.

Q. 21. Joseph N. Wolsey, called as a witness for the plaintiff, testified as follows:

"Q. 13. Anything else. I mean did he tell you of any other reasons why you should buy it?

A. That I could make more money on buying it. That is the same thing and I could dispense it as the same article.

Q. 14. Do you mean that he told you that you could dispense it when the Eli Lilly & Company's Coco-Quinine is called for?

A. Yes, sir."

What have you to say as to the truth or untruthfulness of that statement?

A. Well, it is a mis-statement of facts. My conversation was entirely in relation to a doctor whose office is next to his store
327 and from whom he gets all his prescriptions, and I suggested to him that he buy a gallon bottle of our Quin-Coco and when the doctor came in pour it out and let him taste it, and if you do not find the product satisfactory in every respect the gallon will not cost you anything. If it is, use it and pay for it. My conversation with him on the subject was on account of this doctor from whom he gets his prescriptions. In fact he is the only doctor from whom he gets prescriptions and they are very close friends and I knew if he would bring this matter up with him, he would have an excellent chance of opening a market for our Quin-Coco.

Q. 15. State whether or not you told him that he could dispense Quin-Coco when Lilly & Company's Coco-Quinine was called for?

A. I did not.

Q. 16. Mr. Wolsey further testified:

"R. D. Q. 28. By Q. 13 I asked you if he told you of any other reason why you should buy it. You replied 'that I could make more money on buying it, that it is the same thing and I could dispense it as the same article.' Is this correct?

A. Yes, sir.

R. D. Q. 29. My questions are for the purpose of clearing up a seeming confusion between your direct and your cross-examination. I want to ask you again did or did not the Warner representative tell you that you could furnish Quin-Coco when Coco-Quinine was called for?

A. Yes, sir."

State whether or not you said those things?

A. I do not know of a conversation that I have ever held with the druggist where he brought up the subject of comparison between Coco-Quinine and Quin-Coco. I have told him they were putting out a product that runs two grains to the ninety-six minims. We put out a product that is thinner and will pour more readily
328 than the Eli Lilly & Company's product and I believe that is what I said.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 30. In comparing Quin-Coco with a like preparation what preparation did you mean, usually compare it with?

A. That depends on the preparation that the druggist mentions in his conversation; some of them mention Meyer Brothers Drug Company's, some mention Mulford's, some mention Lilly's, some mention Wampole and some mention William A. Webster, then my comparison was made on that one drug.

X Q. 31. In the case of Mr. Wolsey and Kinder, whose product was mentioned?

A. Lilly's.

X Q. 32. Please give the names of those who mentioned Lilly & Company's product?

A. I do not recall any druggist specifically mentioning any product only those two that came up in this case.

X Q. 33. Please mention the name of any druggist who mentioned Mulford's product?

A. I cannot recall any druggist who mentioned any other product or any other druggist that mentioned Lilly's product, simply these two specific cases.

X Q. 34. Is it not a fact that Lilly's product, Coco-Quinine has a large sale in your territory?

A. I believe that it has.

X Q. 35. Was it Lilly's product that created the demand that you were seeking to fill?

A. Well, I cannot tell you that. All these lines were sold in this territory before I came in charge. I only have been in charge fifteen months.

X Q. 36. Did you ever compare your product with the Lilly product in demonstrating it with druggists?

329 A. Yes.

X Q. 37. Did you demonstrate to them it was the same color?

A. It is not.

X Q. 38. Did you demonstrate to them it was the same taste?

A. Yes.

X Q. 39. It is very difficult to tell the difference?

A. Well, I think there is a difference. Ours is a thinner product and pours more readily than theirs. In fact up until recently Lilly had a preparation that I did not consider a very good article; it was too heavy. They are making a thinner preparation now than they did, and I have mentioned that fact to some druggists that we put up a thinner product than the Lilly, but theirs is almost as thin as ours now, but we are putting out the best chocolate-quinine on the market.

X Q. 40. Is it not identical with the Lilly product?

A. In strength.

X Q. 41. And in appearance?
A. No.
X Q. 42. In what particular?
A. There is a little difference in color.
X Q. 43. A distinguishable difference?
A. Yes, ours runs darker.
X Q. 44. Counsel for your house has recently had an expe chemist analyze the two and examined them, and he has testifie he could detect no difference.

Mr. Rawle: Question objected to for the reason it is not a corre statement of the expert chemist's testimony. What have you to sa to this?

A. I have seen our product and the Lilly product side by side an ours looks blacker, and I have had druggists tell me that is a blacke chocolate in your product than Lilly has in theirs. I do not know anything about the composition of the two outside of the formula on the bottle.

330 X Q. 45. What was the occasion of the druggist mention- ing this?

A. The two products being on a shelf together.
X Q. 46. Mr. Kinder in his answer to Q. 8 stated that you told him that your preparation had caused Lilly to thin down their Coco-Quinine syrup in order to meet the efforts *of* Warner & Company were making, is this true?
A. I believe I told him that; that we were selling so much Quin-Coco throughout the United States that Lilly & Company thinned their product in an endeavor to put out as elegant a preparation as we were putting out.
X Q. 47. You sell considerable Quin-Coco in your territory?
A. Quite a little.
X Q. 48. It is a pretty good selling specialty?
A. Yes.
X Q. 49. You say that Mr. Kinder told an untruth in the testi- mony that you had read which he gave on behalf of the plaintiff in this case?
A. He mis-stated the facts.
X Q. 50. Do you say that Mr. Wolsey, stated an untruth in his deposition on behalf of plaintiff in this case?
A. Both of them omitted the essential part in their statements with me. The conversation with them was entirely with regard to the physicians' prescriptions. Neither one mentioned the fact that I suggested that they take up our Quin-Coco with the physicians who sent prescriptions to the store.
X Q. 51. So far as the statements went were they true?
A. No, because I did not tell them to substitute or suggest that to them.
X Q. 52. Nor was there anything upon which they could infer they might substitute?

A. Absolutely no. I discouraged substitution in every
331 transaction, as a physician would not send a prescription to a druggist that he thought would substitute. I would not take a chance on it.

X Q. 53. Why didn't you call on the physician who was next door to the druggist and persuade him to prescribe your products?

Mr. Rawle: Question objected to as irrelevant.

A. Our house has instructed their salesmen not to detail a physician; that is a loss of time and an expensive proposition and I do not detail a doctor except when I am in a town and there is no train out and nothing else to do, I might go around to his office and loaf with him and talk about the merits of our product, but I never lose any time in doing it.

X Q. 55. Who gave you such instructions in your house?

A. Why, I think Mr. Merner and Mr. Ritayik both.

The Witness May I make an addition, that is not to detail a prescribing physician. Of course I sell dispensing physicians.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 56. What were your instructions as to detailing physicians?

Mr. Bradford: Question objected to as the witness already answered fully.

A. If I was in a town and had time to spare I would go around and see as many doctors as I could and detail them on our specialties, but if I would have to miss a train or lay over, or anything like that, I would just pass it up.

Re-direct examination closed.

332 Recross-examination.

By Mr. Bradford:

R. X Q. 57. I assume that in calling on a thousand drug stores, three or four times a year, selling your entire line, you had very little spare time?

A. That depends on the trains. Now, yesterday, I was in a town that had one druggist and that druggist was away from two o'clock until nine o'clock last night, so all I did was loaf and that frequently happens owing to the rotten railroad service in my territory. I do not have anything else to do.

Recross-examination closed.

EUGENE R. BROWN.

Sworn to before me the 8th day of December, 1915.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

FRED C. STEVENSON, a witness called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Fred C. Stevenson; forty-six; Alhambra, California; Traveling Salesman.
Q. 2. State whether or not you are an old Warner salesman, and since when?
A. Yes, about twenty years.
333 Q. 3. How long have you had a territory on the Pacific Coast?
A. About fifteen years.
Q. 4. Do you know Charles L. Hooper, who at one time was in the employ of the Warner Company?
A. Yes.
Q. 5. Where and when did you know him?
A. I first met him in the D. & S. drug Store, San Francisco, 20 Ellis Street; that was before he went in the employ of William R. Warner & Company.
Q. 6. What year?
A. 1911.
Q. 7. Did you employ him for the house?
A. Yes.
Q. 8. Did you give him any instructions as to the sales policy of the house?
A. Yes.
Q. 9. Did you give him a copy of the "Salesman Confidential?"
A. Yes; I gave him one and instructed him to study it from cover to cover as that covered all the prices and also the direct policy of the house.
Q. 10. Did you travel with him?
A. No, sir; that is only the city trade, not on the road.
Q. 11. Did you watch him sell?
A. Yes.
Q. *11.* And gave him instructions from time to time as he was selling?
A. Yes.
Q. 12. Charles L. Hooper when called as a witness for the plaintiff testified as follows in answer to Q. 6:

"A. In the capacity as the representative for the Pfeiffer Chemical Co., I received instructions from Mr. F. C. Stevenson who was representing the Pfeiffer Chemical Company to sell Quin-Coco as a substitute product for Coco-Quinine, that being the only way that we could sell Quin-Coco, as there was no demand at all for Quin-Coco."

334 What have you to say as to the truth or untruthfulness of this statement?

A. I did not specialize on Quin-Coco. That came up as part of the regular work. We had a great many items to go over and inasmuch as it is one of our poorest sellers in the territory, we did not devote but very little time to it.

Q. 13. State whether or not what he testified to in the words read to you, is true. I hand you the printed volumn?

A. I did not instruct him to sell Quin-Coco as a substitute for Coco-Quinine.

Q. 14. Charles L. Hooper was handed "plaintiff's exhibit Document three," and was questioned as to it and testified as follows:

"Q. 13. Did Mr. Stevenson, to whom you have before referred make any statement to you as to this document?

A. Yes, sir.

Q. 14. What were they?

A. Mr. Stevenson told me in my leisure moments to study up and get posted on competing preparations.

Q. 15. What did he say, if anything, relative to the Coco-Quinine?

A. That to go ahead and sell Quin-Coco for Coco-Quinine, as it was the same and cost the druggists less money."

State whether or not you said that to Mr. Hooper?

A. I did not say to Mr. Hooper that it could be sold as Coco-Quinine.

Q. 15. Mr. Hooper further testified in answer to X Q. 73:

"Quin-Coco was the product I was given explicit instructions to sell against Coco-Quinine, as Coco-Quinine had an enormous sale in California."

335 State whether or not you gave him such instructions?

A. No, sir."

Q. 16. Mr. Hooper testified:

"X Q. 89. Can you remember the facts he emphasized in regard to any other product than Quin-Coco?

A. Castoria.

X Q. 90. What did he emphasize on that?

A. Sell Castoria as a replacer of Fletcher's Castoria.

X Q. 91. What do you understand 'replacer' means?

A. Replacer, I understand as a substitute."

State whether or not you gave him such instructions in regard to the sale of Castoria?

A. Fletcher's Castoria was not mentioned, to my knowledge. There are so many other Castorias on the market.

Q. 17. State whether or not Fletcher's Castoria is sold in original bottles to the customer?

A. Fletcher's, yes.

Q. 18. State whether or not Pfeiffer Chemical Company's Castoria is sold to the customer in the original bottle?

A. Yes.

Q. 19. State whether or not a substitution would be possible in such a case?

A. It would not.

Q. 20. Mr. Hooper further testified in answer to R. D. Q. 101:

"A. I can't remember the words Mr. Stevenson used, but the gist of my instructions was to sell Quin-Coco for Coco-Quinine as he had been slipping it to Lilly on Coco-Quinine in the Sacramento Valley."

336 State whether or not you gave any instructions to Mr. Hooper to that effect, and stated anything about slipping it to Lilly on Coco-Quinine in the Sacramento Valley?

A. I did not.

Q. 21. If a retail druggist has a prescription or a call over the counter for a given preparation of a given maker and dispenses a similar preparation of a different maker, state whether or not that is honest in the druggist?

A. It is dishonest.

Q. 22. State whether or not you thereby express the moral code of the drug business?

A. It is against the moral code of the drug business.

Q. 23. State whether or not it is against your own personal moral code?

A. It is.

Q. 24. If a drug salesman should suggest to a retail druggist when offering him a given perparation that he could dispense it on prescriptions or calls over the counter for a similar preparation of another make, state whether or not you would consider this honest in the salesman?

A. It would be dishonest.

Q. 25. You have been a drug salesman of long experience, state whether or not in your opinion a drug salesman in the long run would benefit his business by suggesting to a retail druggist that he should use one maker's product when another maker's article was specified, either on a prescription or on a call over the counter?

A. No. It would be detrimental to him in the long run.

Q. 26. What effect would such conduct on the part of a salesman doing such a thing have on his reputation with the customer?

A. They would feel that they did not have any confidence in him.

337 Q. 27. State whether or not in your opinion a good drug salesman would understand that method of his would be bad for his business?

A. Yes, it would be very bad.

Q. 28. What effect would it have on a house that he represented if a salesman should pursue that course of business?

A. The druggist would soon find that they did not have any confidence in him either.

Q. 29. You mean in the house?

A. In the house.

Q. 30. In your experience, could a retail druggist create a market for a given preparation if he chose to push a specialty?

Mr. Bradford: Question objected to as irrelevant, immaterial and incompetent.

A. Yes.

Q. 31. In what way?

Same objection.

A. By recommending it to a customer that might come in with some particular ailment and he could counter-prescribe some particular item for that ailment, and in that way increase the sale of a given item.

Q. 32. What work could he do in that line with doctors, if any?

A. The same. Doctors could dispense any item that they choose to buy from any house.

Q. 33. What work could a druggist do in pushing a particular preparation with his doctors?

A. He could recommend it to them, showing them the difference between one of the other preparations, he thought was a better preparation, and in that way create a demand for it with his physicians.

Direct examination closed.

38 Cross-examination.

By Mr. Bradford (without waiving objections):

X Q. 34. Are you at present actively traveling or merely looking after other traveling salesmen in your territory?

A. I travel.

X Q. 35. What territory do you cover?

A. My territory is Southern California, Arizona, New Mexico, part of Colorado and part of Utah.

X Q. 36. You visit retail drug stores in this territory how often?

A. In Southern Califorinia about every ninety days, the balance of the territory, twice a year.

X Q. 37. Please state as near as you can the exact conversation that took place between you and Mr. Hooper when you were instructing him in reference to the sales policy of your house?

A. It was to be thoroughly honest in every way, with himself, the house and the trade.

X Q. 38. Is that the conversation that took place?

A. That is part of it.

X Q. 39. What else was said?

A. Well, we had about five thousand items to go over and we did not dwell very long on any particular item. It was general work in going over the whole line to give him those instructions.

X Q. 40. What did you say to him in reference to this blue list?

A. I showed him the blue list as a comparative list of the various preparations that were on the market.

X Q. 41. In respect to what?

A. In respect to there being preparations that were called for and could be used in different ways with the druggists.

X Q. 42. I note this list enumerates the preparations put out by other houses in the first column and the preparations of your house corresponding thereto, in the next column; do you know
339 why this arrangement was made?

Mr. Rawle: Question objected to as not correctly stating the contents of the blue list.

X Q. 43. I will restate the question, before you answer, I note that the blue list in the first column gives the names of the preparation put out by the original house, the name of the original house, and the price of the original preparation, and in the second column lists the name of your preparation which was similar, with the exception of those preparations formerly belonging to the Searle & Hereth Company, and William R. Warner Company afterwards acquired by the interests controlled by the Pfeiffer Chemical Company. Will you please state the significance of this fact as understood by you?

Same objection.

A. The preparation in the second column is similar to the preparation in the first column and can be sold to the drug trade and they can call attention to the physician of having a preparation that costs considerably less money and reduce the expense to the patient by supplying the Pfeiffer or Warner goods.

X Q. 44. Referring to the item Coco-Quinine on this list, what information does the list give in reference to the item referred to?

A. It gives Coco-Quinine in the first column and Quin-Coco in the second column.

X Q. 45. Does it indicate Quin-Coco is an original preparation?

A. I cannot answer.

X Q. 46. Does it indicate that Coco-Quinine was the original preparation manufactured by Eli Lilly & Company and gives Eli Lilly & Company prices, and that Quin-Coco is the Searle & Hereth preparation to sell in the place of Coco-Quinine and gives your price for this product?

340 A. I cannot say from the list whether it was an original preparation or not.

X Q. 47. Do you know from your knowledge?

A. No, sir.

X Q. 48. Which of these preparations was the first?

A. I do not recall either one of them until I got the Searle & Hereth list.

X Q. 49. You never knew of Coco-Quinine, Lilly, in your territory prior to the time Quin-Coco was listed by your house?

A. No, sir.

X Q. 50. Never heard of it?

A. Never heard of it.

X Q. 51. You had been traveling in your territory in the drug trade prior to that time?

A. Yes; that is in that territory where they used Coco-Quinine.

X Q. 52. Where were they using Coco-Quinine?

A. Sacramento and San Joaquin Valley.

X Q. 53. But you were not traveling in this territory at that time?

A. No, sir.

X Q. 54. You knew, however, that it was being sold in that territory?

A. Not at that time, because I had no other preparation like it and paid no attention to it.

X Q. 55. You just assumed that it was being sold in that territory at that time?

A. Not at the time I went into the territory. To get clear on that, you see I was out on the Pacific Coast before they acquired the William Warner & Company line.

X Q. 56. I am speaking now of Eli Lilly & Company's product?

A. Yes.

X Q. 57. Coco-Quinine, and ask you when that first appeared in the drug stores in the territory you say you solicited trade from?

341 A. I do not remember.

X Q. 58. How long ago, approximately?

A. Eight or nine years ago.

X Q. 59. No longer than that?

A. No, sir, not to my knowledge.

X Q. 60. Please state as near as you can what was said by you to Mr. Hooper in regard to this item, Quin-Coco?

A. I showed him our preparation among the others and stated that we had a preparation which I considered a superior product to Coco-Quinine or any other chocolate mixture, chocolate-quinine sold on the market, it being smoother, thinner, could be poured into a narrower mouthed bottle, and did not turn sour.

X Q. 61. Does Coco-Quinine turn sour?

A. I have had druggists say it did.

X Q. 62. What druggist ever told you that Coco-Quinine, Lilly, turns sour?

A. Eugene Whiting, Orville, California.

X Q. 63. When was this?

A. I should judge about four or five years ago, four years ago.

X Q. 64. Four or five years ago when he told you that the product turned sour?

A. Yes, the time he told me.

X Q. 65. What did Mr. Hooper say to you with reference to the subject of Quin-Coco and Coco-Quinine, if you recall?

A. Nothing at all that I remember.

X Q. 66. He accepted your instructions and followed them?

A. That part of them.

X Q. 67. Do you know whether he disobeyed your instructions?

A. I think he did.

X Q. 68. In what particular?

A. I think he misrepresented a great many things that were told to him. He used his own initiative to further the sale of certain goods.

342 X Q. 69. What is the chief policy of your house?

A. To be strictly honest with the trade, with the customer and with themselves and morally right.

X Q. 70. Did you have one of these Salesmen Confidentials?

A. Yes.

X Q. 71. Did you give one to Mr. Hooper?

A. I cannot say positively but I think so.

X Q. 72. Did you call his attention to the moral teachings in the last part of the book, pages 86 and 87?

A. No, sir. I gave him a book and told him he would have to study it from one end to the other because the whole instruction was in that book.

X Q. 73. Did you ever read these instructions yourself?

A. Yes.

X Q. 74. How long ago?

A. Possibly two years.

X Q. 75. Were they in the same Confidential prior to that time?

A. Yes.

X Q. 76. How long ago?

A. I cannot state.

X Q. 77. In which edition of the Salesman Confidential did this part, pages 86 and 87, first appear?

A. I don't know.

X Q. 78. I call your attention to page 85 of the Salesman Confidential, the first part of the paragraph at the bottom of the page, as follows: "We have written quite fully on this subject, as we consider it second in importance only to the selling of goods," I infer from this that one of the important duties imposed upon salesmen was to get orders for goods?

A. Yes.

X Q. 79. Nothing more important than that?

A. To be honest in getting the orders.

X Q. 80. What did you say to Mr. Hooper in reference to the Castoria item, if anything?

A. I showed him a bottle of Pitcher's Castoria and told
343 him to sell it because it contained more, and the customer got twice as much for his money as any other package on the market I knew of, and also that it contained no alcohol.

X Q. 81. You did not refer to Fletcher's Castoria at all?
A. Not to my knowledge.
X Q. 82. In the particulars and matters called to your attention by counsel for your house, Mr. Hooper's statements then are false, in your opinion—do you state that Mr. Hooper's deposition to be false?
A. The Judge can draw his own conclusions from his testimony and mine.
X Q. 83. Have you ever represented to any of the druggists in your territory that any of your products or any of the products sold by your house could be used as a substitute for products of other houses?
A. No, sir, not as a substitute.
X Q. 84. Have you told them that they could use your products in place of products of other houses without being detected?
A. No, sir.
X Q. 85. Have you ever told them that certain of your products were just the same as certain products of other houses?
A. No, sir.
X Q. 86. Have you ever told any customer that he could use certain products which you were offering him for products of other houses that were called for?
A. No, sir.

FRED C. STEVENSON.

Sworn to before me the 8th day of December, 1915.

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastn. Div., Eastn. Judicial District, of Missouri.

Not being able to complete the taking of these depositions, by agreement of counsel for plaintiff and counsel for defendant, the same was adjourned until Thursday, December 9th, 1915, at 10.00 a. m.

Pursuant to adjournment as before stated, on December 9th, 1915, at 10.00 a. m., the further taking of these depositions was had as follows

ULYSSIS S. MCCLELLAN, a witness being called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. Ulyssis S. McClellan; forty-nine; Kirkwood, Missouri; General Manager of John T. Milliken & Company; Manufacturers of pharmaceuticals, with their plant and business in St. Louis, Missouri.

Q. 2. State whether or not your house, John T. Milliken & Company, has manufactured and placed on the market a chocolate or cocoa and quinine preparation?

A. Yes, we have a chocolate quinine preparation known as "Koquin."

Q. 3. State when that was first put out by your house?

A. Well, according to the records, we have there they first made that in July, 1905. Now, of course, this name we have only had a short time, "Koquin." We called it quino-chocolate before if I remember aright.

Q. 4. In what part of the United States has this product been marketed?

A. In just the territory tributory to St. Louis, that is Texas,
345 Louisiana, Arkansas, Tennessee, Alabama, Kentucky, Illinois, Iowa, Nebraska, Kansas, Washington, and of course Missouri.

Q. 5. State whether or not it is listed in your cataalogue and offered to the trade by your regular sales force?

A. It is.

Q. 6. State whether or not it is sold direct to the retail druggist?

A. Well, in some cases sold direct to the retail druggist, but mostly through the jobber.

Q. 7. For how many years have you been in the drug manufacturing business?

A. Most of my time was on the road, in the neighborhood of twenty-four years.

Q. 8. For how many years have you known of the defendant William R. Warner & Company as a drug manufacturing house?

A. Ever since I can remember.

Q. 9. Do you know what their reputation is as a drug manufacturing house, and if so, please state it?

A. I always considered it one of the oldest and reliable concerns in the country.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 10. When was the chocolate-quinine preparation of Milliken & Company first listed in its catalogue?

A. I cannot tell you about the catalogue, but according to the records we have down there, they were made July 8th, 1905. Now, that is the manufacturing card; that is all we got to go by.

X Q. 11. Is this a record of experimental work or actual turning out of a commercial product?

A. Actual turning out of the product.

X Q. 12. What does this record show?

346 A. Just simply gives the working formula.

X Q. 13. What is the working formula?

A. I cannot tell you.

X Q. 14. How long have you been with Milliken?

A. Four years the 11th of November.

X Q. 15. This product is still being sold by your concern and has been since your connection with it?

A. Yes.

X Q. 16. To a considerable extent?

A. Well, I don't know to just what extent; we sell quite a little of it.

X Q. 17. About how much per annum?

A. I cannot state at all.

X Q. 18. Can't you approximate?

A. No, I cannot give you an idea.

X Q. 19. It is one of your leading items?

A. No, it is not one of our leading items.

X Q. 20. For whom did you travel when you were on the road?

A. Over fourteen years for Parke-Davis & Company, before that time, first with Tilden & Company, and then Moffit-West Drug Company, and then Parke-Davis & Company.

X Q. 21. Were you employed with Parke-Davis & Company up until the time you took employment with Milliken?

A. Yes.

X Q. 22. What territory did you cover?

A. I had charge of the traveling salesmen south of the Chicago branch, and south of the St. Louis branch for a number of years. I covered a great many states for Parke-Davis & Company. I was for three years and had charge in Colorado, Idaho, Montana, Wyoming.

X Q. 23. During that period did you ever hear of Eli Lilly & Company's product, Coco-Quinine?

Mr. Rawle: Objected to as not proper cross-examination.

647 A. Well, I do not remember just exactly when Lilly & Company first marketed Coco-Quinine, in fact I did not pay much attention to it.

X Q. 24. How long ago, from your personal recollection, would you say it was that Lilly first put Coco-Quinine on the market?

A. A number of years, but I would not want to say specifically because I do not remember.

X Q. 25. Ten years?

A. Well, I am pretty sure ten years.

X Q. 26. Fifty years?

A. Well, I don't know about that; I would not want to say.

X Q. 27. Which was the first preparation of general character which you ever heard of?

A. The first that I remember of course was Lilly, I do not know whether there was one before that or not.

X Q. 28. Is it not generally understood in your house and in the trade that your product is an imitation of the Lilly product?

A. No, I do not look at it that way. We do not sell substitutes for anything. We have sold everything since I have had charge of Milliken & Company strictly on its own merits. I do not go and tell anyone this is like so and so, or anything of the kind. There is

a certain demand for it and that is the reason we were listing it. We do not tell anyone that is Coco-Quinine, or that it is as good as Lilly's or as good as anyone else, but we sell it on its own merits.

X Q. 29. While you were employed by Parke-Davis & Company, did you ever suggest to them or ask them to make a product to sell against Coco-Quinine?

Mr. Rawle: I object to that as not proper cross-examination.

A. No.

X Q. 30. Did you ever solicit them to duplicate Coco-Quinine?

Same objection.

348 A. No.

X Q. 31. How long have you known the house of William R. Warner & Company?

A. For years.

X Q. 32. How does its reputation compare to-day with its reputation in the drug trade ten years ago as a pharmaceutical house?

A. I have heard no complaint.

Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 33. To what extent have you the management of the entire business of your house?

A. I have the management of the entire business.

R. D. Q. 34. State whether or not in your opinion the reputation of William R. Warner & Company in the drug trade is as good as it was ten years ago?

A. Yes, I believe it is, because they are still in business, and any concern manufacturing pharmaceuticals nowadays has got to be about right to stay in business. One is as good as the other in my opinion.

Re-direct-examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 35. You have knowledge of the fact, have you, that William R. Warner & Company, since August, 1908, has been controlled by the Pfeiffer Chemical Company interests?

A. Yes. I do not know how long they have been controlled, no; I do not know whether it was since 1908 or how long. I know that for some time they have been controlled by the Pfeiffer Chemical Company.

ULYSSIS S. McCLELLAN.

349 Subscribed and sworn to before me this 31st day of March, A. D. 1916.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

OSCAR G. SALB, a witness called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?
A. Oscar G. Salb, twenty-seven, St. Louis, Missouri, chemist, John T. Milliken & Company, manufacturers of pharmaceut-als, St. Louis.
Q. 2. Does your house put out a chocolate or cocoa and quinine preparation?
A. Yes. A cocoa preparation with quinine sulphate.
Q. 3. What are the functions of the cocoa in this product?
A. We use the cocoa in there in order to give it a pleasont taste, suspending the mixture.
Q. 4. State whether or not the cocoa has any effect in disguising the bitter taste of the quinine sulphate in your preparation?

Mr. Bradford: Objected to as leading.

A. In regard to this preparation, it is hard to say whether the cocoa helps to disguise the quinine itself completely.
Q. 5. If you made two mixtures, one of quinine sulphate with a simple syrup, and the other of quinine sulphate with simple
350 syrup cocoa, mixing them in the same proportions that you now use in your preparation, state whether or not the bitter taste of the quinine sulphate in the second of these mixtures would be masked as against the same, the first of these, and to what extent?
A. Whether the taste would be masked?
Q. 6. Yes?
A. Well, cocoa syrup would aid in masking the taste of the quinine sulphate.
Q. 7. In your perparation is the quinine sulphate in crystal-ine form?
A. Yes, it is crystals.
Q. 8. State whether or not it being in crystallized form, it is held in suspension in the product?
A. It is held in suspension.
Q. 9. State whether or not you can make equally satisfactory pharmaceutical preparations without the use of the cocoa?
A. Not and get the taste.
Q. 10. State whether or not your house has manufactured and

put on the market the cocoa and quinine sulphate preparation that you have referred to?

A. The records show it was made in 1905.

Q. 11. When did you see this record?

A. This morning.

Q. 12. State whether or not it gave the date of the first turning out of the product?

A. I cannot say whether this is the first or not.

Q. 13. State whether or not it gave the date for turning out some of this product?

A. You mean whether this is the date of turning it out?

Q. 14. I am asking whether the statement on the record that you saw this morning gave a date on which some, at least some, of the product was turned out?

A. No, the finishing card shows that the preparation had
351 been finished in the manufacturing department.

Q. 15. What date was on the card do you say?

A. July 8th.

Q. 16. What did the entry show about turning out the product on that date?

A. The return ticket shows that the product was made up according to the formula.

Q. 17. On that date?

A. On that date.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 18. Did the ticket show that a sale had been made?

A. The ticket did not.

X Q. 19. This may have been then this experimental turning out of a quantity of it, I presume?

A. Well, the original card called for forty-five gallons which was duplicated, showed ninety gallons were made.

X Q. 20. On that date?

A. On that date.

X Q. 21. How long have you been employed by John T. Milliken & Company?

A. Two years and four months.

X Q. 22. What are your duties?

A. Chemist.

X Q. 23. To what extent is this product turned out by your house?

A. I do not quite understand.

X Q. 24. To what extent, during the past two years, has this product been manufactured by your house?

A. You mean in what amounts?

X Q. 25. Yes?

A. Well, I really cannot give any definite amount without referring to the records.

352 X Q. 26. How often did you make ninety gallons?
A. We make ninety gallons two or three times a month.
X Q. 27. Is that the size of each lot you turn out?
A. No, the size is forty-five gallons, the original ticket.
X Q. 28. Did you ever make up samples of a quinine sulphate preparation with simple syrup alone?
A. Yes.
X Q. 29. And then with quinine sulphate, simple syrup and cocoa alone?
A. Yes.
X Q. 30. What was the result as to the taste of the two products?
A. Well, the cocoa preparation had a more pleasant taste.
X Q. 31. It tasted of the cocoa?
A. No, it did not taste of cocoa, more of chocolate, sweet.
X Q. 32. Were both of the preparations bitter?
A. Yes.
X Q. 33. What is the formula used by John T. Milliken & Company in making that preparation?

Mr. Rawle: Mr. Rawle suggests to the witness he is not compelled to disclose the nature of the private matters of his firm and objects to the question as calling for such.

X Q. 34. You may make any explanation you see fit?
A. I would not have to give the amounts, I would just have to give the ingredients; we use Yerba Santa, cocoa, quinine, sulphate, sugar, soda bicarbonate, water, vanillin, I do not remember the exact formula.
X Q. 35. This formula was with the house when you came to them?
A. Yes.
X Q. 36. Do you know who did the original work in the preparation of this product for Milliken & Company?
353 A. I do not know.
X Q. 37. Is the person still in the employ of the company, do you know?
A. No, I am pretty sure they are not.

OSCAR G. SALB.

Subscribed and sworn to before me this 18th day of March, A. D. 1916.

[SEAL.]

EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

EDWARD F. HELBIG, a witness called by and on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?
A. Edward F. Helbig, forty-five, 5949 Von Versen, St. Louis, Missouri, department manager of Meyer Brothers Drug Company, manufacturing pharmacists, with plant and office at St. Louis, Missouri.
Q. 2. How long have you been in their employ?
A. Since 1889.
Q. 3. State whether or not this house of Meyer Brothers Drug Company has been putting out a chocolate cocoa and quinine preparation?
A. Yes they have.
Q. 4. Under what name is it sold on the label?
A. Quinico.
Q. 5. State when that was first manufactured and put on the market?
A. 1905.
354 Q. 6. Were you with the house at that time?
A. Yes.
Q. 7. Is it cocoa or chocolate with the quinine?
A. Cocoa.
Q. 8. State in what parts of the United States it has been marketed?
A. Well, through all the south and southwest, west.
Q. 9. State whether or not it is marketed by your regular sales force in that territory?
A. It is and has been.

Direct-examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 10. Who had charge of the making of this preparation in your house?
A. You mean the man who made it for us?
X Q. 11. Yes.
A. I am not positive but I think the name is Leftwich.
X Q. 12. When was it?
A. In 1905.
X Q. 13. Were you in the laboratory at that time?
A. Yes.
X Q. 14. Familiar with the manufacture of the article?
A. Well, no. That is I do not make any of these things myself.

X Q. 15. Did you have Lilly's Coco-Quinine in the laboratory at the time?

A. I do not know about that.

X Q. 16. Was it handled in the house?

A. Oh yes, we sold it.

X Q. 17. Your house also does a wholesale drug business as well as manufacturing business?

A. Yes, jobbing business.

X Q. 18. Do you know whether a considerable quantity of your product was sold in 1905?

355 A. I don't know how much.

X Q. 19. Do you know as to the present output of Quinico, your product?

A. I cannot give the exact figures. I did not look it up.

X Q. 20. State approximately?

A. About forty gallons a month, I guess.

X Q. 21. Has this product been manufactured and marketed by your house continuously since 1905?

A. Every year since that time.

X Q. 22. Has it never been discontinued since then?

A. We did at one time quit making it for a short time.

X Q. 23. What was the reason of your quitting the manufacture of it?

A. We did that at the request of Lilly & Company.

X Q. 24. Why did you resume?

A. Because others were making it.

X Q. 25. Thought you might as well have a piece of the good thing inasmuch as others were doing the same, is that true?

Mr. Rawle: The question is objected to because the witness is not in business and does not occupy any position which would justify him in answering the question or making his testimony of any value.

A. Well I don't know whether to answer yes or no. We then considered it a regular standard article and therefore made it.

X Q. 26. You knew, did you not, that it was an original product of Lilly & Company?

A. Yes.

X Q. 27. This was well recognized in the trade was it not?

A. Yes.

X Q. 28. And your product was intended as an imitation of the Lilly product was it not?

Same objection.

356 A. Not an imitation, a similar product.

X Q. 29. Is it not a fact that it was made in as close imitation of the Lilly product as you could possibly make it?

Mr. Rawle: Objected to because the witness is not qualified to answer.

A. Well, it made the same kind of appearance.

X Q. 30. Was it similar to the Lilly product brought before you to work from and compare it with?

A. I presume it was. I did not work on it myself.

Cross-examination closed.

EDWARD F. HELBIG.

Subscribed and sworn to before me this 18th day of March, A. D. 1916.

[SEAL.] EDWARD W. TOBIN,
Deputy Clerk of the U. S. District Court, Eastern Division, Eastern Judicial District of Missouri.

It is stipulated by and between counsel for the respective parties that the defendant's time for taking its proofs may be extended, the Court approving, until February 1st, 1916, it being understood that should the defendant conclude before that date, the plaintiff, if it desires, may proceed at once with taking rebuttal; and that plaintiff may have until April 15th, 1916, to conclude its rebuttal testimony, the Court approving.

Counsel for respective parties stipulate that inasmuch as the following witnesses—James W. Wilkins, B. F. Jones, Henry Richards, Henry Joseph Gonzales, Clinton Gordon McCarthy, Ernest B. De Vall, William C. Kerstan and Fred C. Stevenson—having come from a distance and have returned home, that the Special Examiner, after the depositions have been transcribed by the
357 stenographer and approved by Edward W. Tobin, that the deposition of each witness shall be sent to each of said witnesses for the purpose of obtaining his signature thereto, and that the signing of the depositions by the respective witnesses before the Special Examiner, shall, as to the witnesses above mentioned, be waived, and the depositions signed as herein provided, shall be read at the final hearing with the same effect as if each of them had been signed by the witness himself, in the presence of the Special Examiner.

The further taking of depositions in this cause is adjourned by stipulation of counsel until Tuesday, December 28th, 1915, at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pennsylvania.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, Edward W. Tobin, acting in this cause as Special Examiner pro hac vice by agreement of counsel for the respective parties, do hereby certify that the foregoing depositions of Garfield D. Merner, Henry J. Ritayik, James W. Wilkins, B. F. Jones, Howard Henry Richards, Henry Joseph Gonzales, Clinton Gordon McCarthy, Ernest B. De Vall, William C. Kerstann, Eugene R. Brown, Fred C.

Stevenson, Ulyssis S. McClellan, Oscar G. Salb and Edward F. Helbig, were taken on behalf of the defendant in cause No. 1355, pending in the District Court of the United States for the Eastern District of Pennsylvania, wherein Eli Lilly & Company is complainant, and William R. Warner & Company is defendant, before me at room 144 Planters Hotel, in the City of St. Louis, State of Missouri, more than one hundred miles from Philadelphia, Pa.; that said witnesses and each of them were, pursuant to stipulation of
358 counsel for the respective parties, duly sworn by me as Deputy Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, before the commencement of their testimony, to testify the truth, the whole truth and nothing but the truth, as appears in the foregoing record; and I do hereby further certify that I am a duly appointed and qualified Deputy Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri; that the testimony of each of the said witnesses was taken down in shorthand and transcribed by William H. Corcoran, acting by consent of parties; that the depositions of the respective witnesses were commenced and concluded on the dates as shown in the record; that the depositions of witnesses Garfield D. Merner, Ulyssis S. McClellan, Oscar G. Salb and Edward F. Helbig, were read over and signed by the respective witnesses in my presence, and that each witness made oath to the correctness of his deposition at the time of subscribing to the same; that the depositions of witnesses Henry J. Ritayik, James W. Wilkins, B. J. Jones, Howard Henry Richards, Henry Joseph Gonzales, Ernest B. De Vall, William C. Kerstann, Eugene R. Brown and Fred C. Stevenson, who are all non-residents of the City of St. Louis, were by agreement of counsel for the respective parties forwarded to the said witnesses for signature; that the signature of witness Clinton Gordon McCarthy to his deposition was by agreement of counsel waived; that I am not connected either by blood or marriage with any of the parties, nor interested directly or indirectly in the matter in controversy in said cause.

In testimony whereof, I have hereunto set my hand, in the City of St. Louis, State of Missouri, this 8th day of April, A. D.
359 1916, and do now return the foregoing depositions, duly signed, sealed and marked, into the District Court of the United States for the Eastern District of Pennsylvania.

[SEAL.]

EDWARD W. TOBIN,
Special Examiner pro hac vice, Acting by Consent and Agreement of Counsel for the Respective Litigants.

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Depositions on Behalf of the Defendant, Take Before George Brodbeck, Esq., Special Examiner, at the Office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., on Tuesday, December 28th, 1915, at 10 o'clock a. m.

Met at the office of Francis Rawle, Esq., West End Trust Building, Philadelphia, Pa., pursuant to adjournment taken at St. Louis on December 9, 1915.

Present:

George Brodbeck, Esq., Special Examiner.
E. W. Bradford, Esq., representing the plaintiff.
Francis Rawle, Esq., representing the defendant.

H. E. STARRING, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, residence, age and occupation?
A. H. E. Starring; thirty years old; residence, Detroit, Michigan; occupation, traveling salesman.
360 Q. 2. State briefly and chronologically what has been your connection from the first in the drug business?
A. Since about high school time——
Q. 3. When did you first go into the drug business?
A. I went to work in a drug store when I was about ten years old, and have been connected with the drug business practically ever since. I am a registered pharmacist in Michigan, but have never owned a drug store of my own.
Q. 4. Did you ever work in a drug store as a prescription clerk?
A. I worked in a drug store as a prescription clerk for about seven years.
Q. 5. Mention when. Up to what time was the end of the seven year period?
A. Up until about December, 1912. .
Q. 6. Where?
A. Detroit, Michigan.
Q. 7. Then where did you go?
A. Shortly afterward, in February, 1913, I entered the employ of William R. Warner & Company. My territory was Detroit and six surrounding counties. In the latter part of August, 1914, my territory was enlarged to include several more counties surrounding this district. That is, my present territory.
Q. 8. About how many retail druggists are there is that territory.
A. I estimate about eight hundred or more retail druggists in this territory.
Q. 9. About how often do you call on these druggists?
A. On an average of three times a year.

Q. 10. Approximately how many items are there in the entire lines which you sell?

A. I estimate five thousand or more.

Q. 11. What is your practice as to pushing particularly one or a few items, or, on the other hand, your entire line?

A. Our policy is to sell assorted lines, a variety.

361 Q. 12. Do you mean to sell the entire line if you can?

A. Yes.

Q. 13. How long does the usual call on a given druggist occupy in offering him the entire line?

A. From one to two hours or more.

Q. 14. Up to how long?

A. Very seldom over three hours.

Q. 15. State whether or not you have made sales of Quin-Coco, S. & H., in your territory?

A. Yes.

Q. 16. How good a seller is it?

A. Fair.

Q. 17. Did any assistant sales manager of William R. Warner & Company instruct you in your selling duties when you first went to them?

A. Yes.

Q. 18. Who was it?

A. Mr. Hagaman, who is now with the house.

Q. 19. State whether or not he gave you a copy of the "Salesman's Confidential"?

A. Yes.

Q. 20. What instructions did he give you with regard to studying that and following its teachings?

A. He informed me that the "Salesman's Confidential" contained rules and regulations of the house which should be followed.

Q. 21. Have you had a copy of that ever since?

A. I have.

Q. 22. How carefully have you read the rules governing the sales policy?

A. I have read it over several times.

Q. 23. Can you state what they say on the subject of competitor's goods?

A. One rule says "never to speak ill of a competitor."

Q. 24. Do you remember any other rule on that same subject of competitor's goods?

A. "Never to speak ill of competitor's goods."

362 Q. 25. State whether or not you received any instructions from Mr. Hagaman as to honesty in selling?

A. Yes, he instructed me to adhere to the truth in selling goods.

Q. 26. Will you state whether or not there was any rule in the "Confidential" as to mentioning competitors' goods?

A. There is one rule, which we interpret, from the instructions which Mr. Hagaman gave us, that we should not mention our competitor's goods, but sell our own.

Q. 27. Do you remember whether you ever came to the Philadelphia house about the time you first were employed?

A. I remember that I came shortly afterward.

Q. 28. Who did you see there?

A. I saw Mr. Pfeiffer.

Q. 29. Did you come to the house later and see Mr. G. A. Pfeiffer?

A. Yes, sir.

Q. 30. State whether or not Mr. G. A. Pfeiffer gave you any instructions as to selling policies, and how to do it?

A. Mr. G. A. Pfeiffer said that the policy of the firm was to sell assorted lines, or variety, and not to speak ill of a competitor or his goods, and treat the customer right.

Q. 31. If a retail druggist on a prescription or call over the counter for a preparation of a given make should dispense a similar preparation of a different make, state whether or not you would consider that honest in the druggist?

A. I would not consider it honest.

Q. 32. State whether or not in the ethics of the drug trade that is considered honest?

A. It is not.

Q. 33. State whether or not in the ethics of salesmanship it is considered honest?

A. It is not.

363 Q. 34. State whether or not if a drug salesman suggested to a retail druggist that he should do that thing, you would consider him an honest drug salesman?

A. I would not.

Q. 35. What do you know about a William M. Merithew of Michigan?

A. He is a retail druggist in Highland Park, Michigan.

Q. 36. Do you remember when, if ever, you called on him for the first time?

A. I remember calling on him in the spring of 1913, and again in the fall of 1913, and after that at periods of about every three or four months, until about June 1915, since which time I have not called on him.

Q. 37. William M. Merithew, when called as a witness for the plaintiff, testified as follows:

"Q. 5. Do you know anything of a product called 'Quin-Coco,' and if so, what?

A. Mr. H. L. Starring, representing the William R. Warner Company, offered to sell me a preparation known as 'Quin-Coco,' stating that it could be dispensed as 'Coco-Quinine,' when 'Coco-Quinine' was called for. He exhibited a sample from his sample case, and stated to me that in both taste, physiological action and appearance it could not be distinguished from the original 'Coco-Quinine.'"

State whether or not you said this to Merithew at any one of those visits. I hand you the Plaintiff's printed record?

A. On any of my visits to Mr. Merithew I did not offer to sell a preparation known as "Quin-Coco" stating that it could be dispensed as "Coco-Quinine" when "Coco-Quinine" as called for, neither did I say that in both taste, physiological action and appearance it could not be distinguished from the original "Coco-Quinine."

364 Q. 38. Mr. Merithew also testified as follows:

"Q. 6. What other inducements, if any, did Mr. Starring offer as reasons why you should purchase the product he thus offered to you?

A. He stated to me that this product would be a great deal more economical in price than the original 'Coco-Quinine' preparation. That several druggists were using it in preference to the original 'Coco-Quinine,' in several cities, in Michigan, some of which he named as Saginaw, Bay City and Flint."

State whether or not you said this to Merithew at any one of those visits? I hand you Plaintiff's printed record.

A. I did not state that this product would be a good deal more economical in price than the original "Coco-Quinine" preparation, or that several druggists were using it in preference to the original "Coco-Quinine" in several cities in Michigan, some of which he named as Saginaw, Bay City and Flint.

Q. 39. Merithew testified as follows:

"X Q. 19. Then, he was asking you, according to your testimony, to do something that was not honest, was he not?

A. He was."

Please state whether or not you asked Merithew or suggested to him that he should do something in respect to the sale of "Quin-Coco" that was not honest in the druggist?

A. I did not.

Q. 40. Merithew in answer to X Q. 20, testified that he politely informed you that he had never substituted, and that he did not care to start to do the same. State whether or not Merithew said that to you at any of those interviews?

A. I remember of no such conversations.

365 Q. 41. State whether or not in any of these conversations you talked with Merithew as to the similarity of "Quin-Coco" to Lilly's "Coco-Quinine?"

A. No special mention was made of "Quin-Coco" as compared with the Lilly's "Coco-Quinine."

Q. 42. Do you remember how long these interviews with Merithew occupied?

A. Less than an hour.

Q. 43. How much of your entire line did you go over with Merithew in that hour?

A. I rapidly went through my demonstration books, showing him the entire line.

Q. 44. In offering your line to Merithew in these interviews,

when you came to "Quin-Coco," what did you say to him? What was it you did say to him?

A. I said, "Could you use any 'Quin-Coco,' " and he did not seem interested in buying this product, so I passed on to the other preparations.

Q. 45. Did he ever buy any "Quin-Coco" from you?

A. He did not.

Q. 46. Did you take up your line with him at every time you went to his store?

A. I did the first three times.

Q. 47. Why did you go there the other times that you have mentioned?

A. After the third time I went principally to collect his past-due account.

Q. 48. How many calls for that purpose?

A. About four or five.

Q. 49. Approximately, how much was the account?

A. The past due account at that time was about $15.00.

Q. 50. Did you collect it finally?

A. I finally collected it.

Q. 51. On these visits to collect the account, did you attempt to sell him any drugs?

A. I did not.

Q. 52. Do you know Albert F. Knowles?

366 A. I do. He is a retail druggist of Saginaw, Michigan.

Q. 53. Do you remember calling on him to sell your line?

A. I do.

Q. 54. When?

A. In the fall of 1914.

Q. 55. What did you offer him?

A. I opened up my case and showed him my tray of pharmaceutical preparations, and told him we had a special offer in the liquids, five gallon assortment, and he did not seem interested in this. So I passed on to the other numbers of the line until I finished showing him the entire line.

Q. 56. State whether or not "Quin-Coco" was included in the first tray that you took out of your case?

A. It was.

Q. 57. How long did you spend on that tray?

A. About five minutes.

Q. 58. How many preparations were there in that tray?

A. About seventeen samples.

Q. 59. State whether or not you discussed any one of the seventeen with him at that time?

A. No special mention was made of any one preparation. I dwelt upon the offer as a five gallon assortment, leaving it to him to decide which of the preparations he was going to use to make up the assortment.

Q. 60. By a "five gallon assortment" you offered him five gallon prices, and he could take a gallon of each of the five different articles. Is that correct?

A. Yes.

Q. 61. Albert S. Knowles, when called as a witness for the plaintiff, on March 24, 1915, testified as follows:

"X Q. 25. Has he been at your place this year?
A. Not that I know of."

State whether or not this is true?

367 A. That is not true. I called on him in the early part of March, 1915, about the 8th, I reckon.

Q. 62. How do you fix the date as March 8th?
A. I sold him a bill of goods on that date.
Q. 63. Have you the record of it?
A. I have a record of it, a copy of the order being on file in the house.
Q. 64. At Philadelphia?
A. At Philadelphia, made out in my handwriting.
Q. 65. Have you seen it this morning?
A. I saw it this morning, and noticed that he had bought a gallon of "Quin-Coco."

Q. 66. Knowles also testified in answer to question eight:

"A. A representative of the William R. Warner Company introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of 'Coco-Quinine' when I could use his product at a cheaper price.
Q. 9. Use his product for what purpose?
A. For dispensing purposes, and also to sell on call.
Q. 11. Please state what, if anything, the representative of William R. Warner Company said to you in reference to the dispensing of this product called 'Quin-Coco' on call? I mean on call for what?
A. For 'Coco-Quinine' or Chocolate Quinine, Syrup Quinine, or where the syrup of quinine is used."

State whether or not this statement made by Knowles was true?

A. I did not represent to Mr. Knowles that he was foolish for paying $4.80 for a gallon of "Coco-Quinine," nor that he could use our product at a cheaper price for dispensing purposes, or to sell on call, nor for "Coco-Quinine."

Q. 67. Knowles also testified:

368 "X Q. 28. Won't you state the salesman's exact words with reference to selling his product on call &c.?
A. He took a sample of 'Quin-Coco' from his grip and asked me if I handled that product. I said 'No, I have always used "Coco-Quinine" for all such calls.' He said, 'Well, don't you think you could handle this to your advantage.' I said, 'I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to use the "Coco-Quinine"'. Then he stated the price that I was paying for the 'Coco-Quinine' and that I could use his product and save the difference. I told him 'no, I will continue with the 'Coco-Quinine' as it always gave the best satisfaction.'"

State whether or not Knowles made those statements to you and you made those statements to Knowles?

A. I did not make those statements to Knowles nor did Knowles make those statements to me.

Q. 68. State particularly whether anything was said at that interview on the subject of "substitution"?

A. No mention was made of substitution.

Q. 69. How long before March 24, 1915, when he so testified, had you sold him "Quin-Coco"?

A. About two weeks before that time.

Q. 70. State whether or not you have since sold Knowles any "Quin-Coco" and when?

A. I sold him one gallon of "Quin-Coco" on December 9, 1915.

Q. 71. Will you now state what was said between you and Knowles at the interview when you offered him "Quin-Coco"?

A. No special mention was made of "Quin-Coco." He bought the article to make up a quantity buy, which accorded him a special price on the whole order.

369 Q. 72. I meant to ask you what conversation really did take place between you and Knowles, as to which he has given his version?

A. There was no conversation which took up the subject of "Quin-Coco" in particular. It was included as one of the many articles in the line which I had to sell.

Q. 73. Have you in practice a uniform manner of introducing "Quin-Coco" to a new customer who has never kept it in stock, and, if so, what is your method?

A. I have a method of introducing "Quin-Coco" to a customer who is not familiar with it, by showing him that it is a good method of administering quinine sulphate, being a palpable chocolate syrup containing two grains of quinine to the dram or teaspoonful, and especially nice for children, as well as for adults.

Q. 74. Anything about its consistency?

A. That it is a smooth mixture, being readily handled, that is, being poured from one bottle into another.

Q. 75. Will you state whether or not there is a demand in your territory for a preparation containing quinine and disguising the bitter taste of the quinine?

A. There is such a demand.

Q. 76. On what calls?

A. There is a demand or call by the people at the counter of the drug stores for a palpable syrup of quinine which is dispensed by the druggists, sometimes under the name of "Baby Tonic."

Q. 77. Can you mention any names under which a preparation of that syrup is called for?

A. I believe "Baby Tonic" or "Chocolate Quinine" is the principal name used.

Q. 78. What about customers stating that they are sick and asking for a remedy?

Mr. Bradford: Objected to as leading. Also as immaterial.

A. It gives an opportunity to the druggist to recommend a preparation like "Quin-Coco."

370 Q. 79. State whether or not a retail druggist can, if he chooses, by special efforts, create a market for a given preparation?

A. He can.

Q. 80. How?

A. By showing and recommending it to his customers and physicians.

Q. 81. Do you know whether this is a common practice among druggists?

A. It is.

Q. 82. Can you mention instances that are rather specially important in the drug trade?

A. We have preparations which druggists have bought with the special intention of introducing them to their customers, and also to their physicians. One of these is a preparation known as "Tolu-Heroin (Syrup) Compound," Elixir Salicylate Comp," "Gonichon," "Formin Lythia Tablets," and many other preparations, which I could name.

Q. 83. State whether or not there are drug houses whose lines are exclusively pushed by certain drug stores?

A. There are.

Q. 84. Name the drug houses?

A. The United Drug Company, Frederick Stearns & Company, Nelson Baker & Company, Dupree Chemical Company, American Druggist Syndicate, Park Davis & Company, and many others.

Q. 85. State whether or not you have come across any other make of a chocolate quinine preparation in your territory except "Quin-Coco" and "Coco-Quinine"?

Mr. Bradford: Objected to as immaterial, irrelevant and incompetent.

A. I have seen chocolate quinine preparations manufactured by the Norwich Chemical Company, Chicago, and Wampole & Company, Philadelphia.

Q. 86. Do you work among the dispensing doctors?

371 A. I do, some.

Q. 87. State whether or not you find a market for "Quin-Coco" with them?

A. I find a market for "Quin-Coco" among the dispensing doctors.

Mr. Rawle: Direct examination closed.

Cross-examination, beginning at 11.32 a. m.

By Mr. Bradford:

X Q. 88. What part of your time do you devote to work among dispensing doctors?

A. A small part of my time is devoted to calling on dispensing doctors, most of my time being taken up with calling on the retail druggists.

X Q. 89. How many dispensing doctors do you call on?

A. I should estimate them to be about forty or fifty.

X Q. 90. How many dispensing doctors are there in the territory which you serve?

A. I do not know.

X Q. 91. How much "Quin-Coco" have you sold to dispensing doctors in your territory during the year 1915?

A. I should think probably five gallons or more.

X Q. 92. How much "Quin-Coco" have you sold to the retail drug trade in your territory during the year 1915?

A. I don't know how much.

X Q. 93. What would be your estimate?

A. Probably twenty gallons or more.

X Q. 94. Is this about an average year's business of this product?

A. I should think so, although I never kept any track of any one item of my sales.

X Q. 95. How many years have you been in that territory?

372 A. My present territory since the latter part of August 1914.

X Q. 96. Who was your predecessor in the territory?

A. Mr. Rogers.

X Q. 97. Has Mr. Rogers traveled in the territory at all since you have been in it?

A. He has not. Not my territory.

X Q. 98. In representing "Quin-Coco" to be an especially "smooth" product to your customers, what do you mean? Please explain more fully your significance of the word "smooth"?

A. The consistency of the syrup, for such it is, a chocolate syrup of quinine.

X Q. 99. You make no comparisons, as I understand, with any other products on the market?

A. Other than that, there is no comparison made.

X Q. 100. "Other than that." What do you mean by that?

A. In mentioning our product, it is, of course, compared with all similar preparations.

X Q. 101. You have not, in presenting your product for sale, compared it at any time with "Coco-Quinine," as I understand you?

A. That is not the rule.

X Q. 102. You sometimes do compare "Quin-Coco" with "Coco-Quinine"?

A. I have compared it in a few cases with "Coco-Quinine."

X Q. 103. But not in the instance concerning which you have testified? I refer to the complainant's witness Knowles.

A. Yes. I do not remember of "Coco-Quinine" being mentioned in Knowles case.

X Q. 104. In your interviews with Mr. Knowles "Coco-Quinine" was not mentioned?

A. It was not.

X Q. 105. Your product was not compared with "Coco-Quinine" either as to consistency or as to price?

A. The price of my article "Quin-Coco" was mentioned
373 along with other preparations which I was showing him at that time.

X Q. 106. But you did not state to Mr. Knowles that he could save money by buying your preparation instead of "Coco-Quinine"?

A. I told him that I had a good buy on these preparations and he could save money by making up the assortment.

X Q. 107. As I understand your direct testimony you did not, however, suggest to him that he could use your product "Quin-Coco" as a substitute for "Coco-Quinine"?

A. I did not.

X Q. 108. And that you did not say to him or in any way suggest to him that his customers could not tell the difference?

A. I did not.

X Q. 109. You did not say to him or suggest to him that the two products were so near alike, both in appearance and in therapeutic effect, that yours could be used for the Lilly product, without detection?

A. I did not.

X Q. 110. You have not made any such representations to any of the druggists in your territory?

A. I have not.

X Q. 111. You believe that any salesman who would suggest to a retail druggist that he might substitute one product for another would be a dishonest salesman?

A. Yes.

X Q. 112. And you have not done such a thing in your experience as a salesman for William R. Warner & Company?

A. I have only offered what goods I had for sale leaving it to the retail druggist to decide as to his best method of disposing of it.

X Q. 113. But you have not suggested to the retail druggist as to any methods he might employ in disposing of it?

374 A. I have offered suggestions.

X Q. 114. Nor as to what other products he might sell them in the place of?

A. What articles are you speaking of now?

X Q. 115. Any articles in your line.

A. We have a broad line and many preparations, and I wish to know what particular articles you refer to.

X Q. 116. The purport of my question is, have you ever represented to any druggist that he might use or sell any of your items in the place of other items of like character?

A. I have sometimes shown my customers where they could use preparations of ours to supply a demand where no particular preparation was specified.

X Q. 117. This is the extent of the representations concerning the use of your items in the place of other competitive items, is it?

A. Our policy is to sell the line, rather than to point out how the dealer might dispose of the line. We leave it to his judgment as to that part of it.

X Q. 118. Had Mr. Knowles any "Quin-Coco" in his store when you sold him the first gallon you have referred to?

A. I do not know.

X Q. 119. Do you know whether he had ever handled it before?

A. I do not know.

X Q. 120. Did you have any trouble in inducing Mr. Knowles to purchase this item?

A. I did not.

X Q. 121. He was thoroughly familiar with it at the time?

A. He seemed familiar with it, as he was with the other items in my line.

X Q. 122. These products are commonly known as "Baby Tonic" and "Chocolate Quinine" in your territory, as I understand it?

A. So the dealers tell me.

375 X Q. 123. What dealer ever told you this?

A. Mr. A. V. Williams of Saginaw?

X Q. 124. Any others that you can recall?

A. Mr. Lourim, of Bay City. Mr. Schmeck of Saginaw. There are many others. Mr. Kessel of Saginaw, and many others.

X Q. 125. What was the occasion of those gentlemen or any of them making such statements to you?

A. In buying "Quin-Coco" they remarked that they sold considerable of it under the name of "Baby Tonic," diluting it in some instances with simple syrup.

X Q. 126. Did any of these druggists ever mention "Coco-Quinine" to you?

A. Yes.

X Q. 127. The product is known in your territory, is it?

A. I believe it is known somewhat.

X Q. 128. Is it ever called for?

A. I believe it is.

X Q. 129. But the leading names for the product in your territory are "Baby Tonic" and "Chocolate Quinine?"

A. That seems to be the purpose for which the dealers purchase "quin-Coco" of me. Also dispensing it over the counter as a preparation of quinine.

X Q. 130. In receiving your instructions from Mr. Hagaman, did he give you any other documents to guide you in your salesmanship than the "Salesman's Confidential?"

A. Nothing other than my various price lists.

X Q. 131. Did you have a list known as the "Blue List" or "Comparative Price List?"

A. I did.

X Q. 132. What did he tell you in reference to this?

A. He said that that was merely what it indicated, the comparative price list.

X Q. 133. In testifying concerning certain dates when you called on Mr. Merithew you referred to a paper which you took

376 from your pocket. What was this paper?

A. That was a statement of the debits and credits of his account.

X Q. 134. Do you have any objection to stating why you referred to this paper in answering these questions?

A. To refresh my memory on the dates on which I called on Mr. Merithew.

X Q. 135. Where did you get this paper?

A. At the house.

X Q. 136. Here in Philadelphia?

A. Yes, sir.

X Q. 137. When?

A. Yesterday.

X Q. 138. You referred to another paper in answering another question. What was this?

A. What question do you refer to?

X Q. 139. It was in your answer to Mr. Rawle's questions relating to the calls on Mr. Knowles.

A. This was a memorandum in my own handwriting showing the dates during 1915 at which I had called on Mr. Knowles, and during which time I had sold him "Quin-Coco."

X Q. 140. When did you make this memorandum?

A. This morning.

X Q. 141. What rule in your "Salesman's Confidential" tells you never to speak ill of a competitor's goods?

A. One of the rules, the number of which I do not remember.

X Q. 142. When did you first receive a copy of the "Salesman's Confidential" from Mr. Hagaman?

A. On the day I started for the house, on the day I started working for the house.

X Q. 143. What day was this?

A. The latter part of February, 1913.

Mr. Bradford: Cross-examination closed at 12.05 p. m.

377 Redirect examination.

By Mr. Rawle:

R. D. Q. 144. You have referred to a memorandum from which you fixed the dates of your calls on Knowles. From what was that memorandum made?

A. From the original orders which I sold Mr. Knowles.

R. D. Q. 145. Where did you find it, and in whose handwriting is it?

A. I found it in the offices of William R. Warner & Company.

R. D. Q. 146. In Philadelphia?

A. In Philadelphia.

R. D. Q. 147. When?

A. Yesterday.

R. D. Q. 148. And in whose handwriting is it?

A. In my own handwriting.

R. D. Q. 149. On what dates relatively to the transactions with Knowles were those orders made out by you?

A. These orders were made out on the day on which I called on Mr. Knowles and sold him.

R. D. Q. 150. Sold him what, among other things?

A. Among others things, "Quin-Coco."

(Mr. Rawle states that these orders are here in this room, and open to the inspection of counsel for plaintiff if he desires to see them.)

Mr. Bradford: I would like to see them.

(Mr. Bradford asks for the orders, and they are produced.)

(Mr. Bradford notes that in the order dated "8-9-1915," in rubber stamp, appears under the words "Date received" the date "December 11, 1915," and another place appears the words "Credit O. K., December 13, 1915, Keller," and in another place appears the words "Registered December 18, 1915, W. R. W. & Co.")

378 By Mr. Rawle:

R. D. Q. 151. Referring to the statement just made on the record by Mr. Bradford, please explain the differences in date, and if there is any error, correct it.

A. There is an error in the "Date sold" on this order. It is given as August 9, 1915, and it should read December 9, 1915.

R. D. Q. 152. What is there on the face of the order which leads you to say so?

A. The date stamped in the house on which the order was received, which is December 11, 1915.

R. D. Q. 153. Have you any other memorandum made at the time as to this sale from which you can refresh your memory and testify to the correct date on the order?

A. I have. I produce my memorandum book, a loose leaf book, which shows that I sold A. E. Knowles on November 9, 1915, but it should read December 9, 1915.

R. D. Q. 154. Have you any uniform practice, and have you any uniform orders from the house, as to how promptly you shall report orders to the house?

A. The instructions are to mail my orders every night, and that is my practice.

R. D. Q. 155. Do you remember whether or not you ever called upon Knowles during this current month of December?

A. I do remember.

R. D. Q. 156. State whether or not you remember selling, or not selling him, "Quin-Coco" at your call during the current month of December?

A. I remember selling him "Quin-Coco" at that date in December.

R. D. Q. 157. You have been cross-examined as to a rule in the "Salesman's Confidential." Please read from the "Salesman's Confidential," which I hand you, the rules which refer to truthfulness and to the mention of competitors' goods.

379 A. Rule 16. "That it pays to adhere strictly to the truth at all times."

"Rule 17. That it don't pay to speak ill or even mention your competitor."

R. D. Q. 158. Any others?

A. No. 1, on page 87, under the paragraph "Our Policy in Dealing with the Trade, Briefly stated."

Rule 1. "We believe in honesty and fair dealing."

Rule 6. "To never speak ill of a competitor."

R. D. Q. 159. Do you know anything about the history of the expression "Baby Tonic," how it was introduced, and to what it afterwards came to be applied?

A. Several druggists have told me that several years ago there was a quinine mixture being used under the name of "Baby Tonic." Its flavoring agent was licorice, but eventually the dealers used "Chocolate Quinine" preparations, which sold better, and finally became established, and sold under the name of "Baby Tonic."

Mr. Rawle: Re-direct examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 160. What chocolate quinine preparations did the druggists mention in this connection?

A. They did not mention any particular chocolate quinine preparation.

R. X Q. 161. Didn't they mention "Coco-Quinine" in this connection?

A. I have heard that "Coco-Quinine" has been used in this connection, as several others, of similar preparations.

R. X Q. 162. Isn't it true that "Coco-Quinine" was the original preparation of this kind, so far as you know.

A. I do not know.

380 R. X Q. 163. What preparation of this character did you know of before you knew of "Coco-Quinine"?

A. I don't know which one I heard of first. I have known of quinine, chocolate quinine preparations, dating back several years.

R. X Q. 164. How long?

A. Ever since I was a boy, having been in the drug business nearly all my life.

R. X Q. 165. How many years since you first learned of a chocolate quinine preparation?

A. I don't know. It was many years back.

R. X Q. 166. Approximately how long?

A. I could not state how many years back. It is a period that is indefinitely fixed in my mind.

R. X Q. 167. You gave your age as thirty, stating that you started in the drug business at ten, and have said that you remember such a preparation as a boy. Do you mean when you first started in the employment of a drug store, when you were a boy of ten years old, that you knew of these things, I mean chocolate quinine preparations?

A. I did not know of chocolate quinine preparations when I first started in the drug business, working in the store.

R. X Q. 168. What store did you work in?

A. I worked in my father's store.

R. X Q. 169. Where?

A. Rochester, Michigan.

R. X Q. 170. Up until what time?

A. Up until about the age of nineteen.

R. X Q. 171. That would be up until about eleven years ago?

A. Yes.

R. X Q. 172. About the year 1904?

A. About that.

R. X Q. 173. Did you do prescription work in your father's store before leaving?

A. I did very little, only under his supervision.

381 R. X Q. 174. Did your father's store handle Lilly's "Coco-Quinine" before you left the store?

A. I do not remember of seeing it there.

R. X Q. 175. Where did you go after leaving your father's store?

A. I took up a business course in the Detroit Business College.

R. X Q. 176. When did you re-enter the drug business?

A. About two or three years after that time.

R. X Q. 177. About 1906 or 1907?

A. About.

R. X Q. 178. Where and with whom?

A. With M. R. Deo, North Branch, Michigan.

R. X Q. 179. How long were you with him?

A. About a year and a half.

R. X Q. 180. Did he sell "Coco-Quinine" Lilly?

A. I think he had some in stock.

R. X Q. 181. Where did you go after leaving Mr. Deo?

A. I went to Detroit, working at Simons & Cooper Company, retail druggists.

R. X Q. 182. How long were you with them?

A. About a year, I think, or perhaps less.

R. X Q. 183. Where did you go from that store?

A. From there to Bertram Brothers, retail druggists, Detroit, Michigan.

R. X Q. 184. How long were you with them?

A. I was with them I think about two years.

R. X Q. 185. Then after that.

A. After that I entered the employ of William R. Warner & Company.

R. X Q. 186. February 1913?

A. Yes, sir.

R. X Q. 187. In referring to the memorandum book in your pocket, you first stated that you sold Knowles in November 1913. Is the memorandum in that book so dated?

A. The memorandum in this book has at the top of every

382 page the month, and then down through the page I put the dates, and referring to the previous page, I notice the dat

December 4, 1915. Now on the following page, they should follow in rotation, I put down the number "11," an error, in place of "12." I put down "11-9-15" in place of "12-9-1915." It is an error which I discovered by referring to the previous page.

R. X Q. 188. And so corrected your answer?

A. And so corrected my answer.

Mr. Bradford: Re-cross-examination closed.

Re-redirect examination.

By Mr. Rawle:

R. D. Q. 189. I have the memorandum book produced by you. Please state as it is written therein the date at the top of the preceding page, when the Knowles entry is made.

A. "12-4-15."

R. D. Q. 190. Then follows what dates on that page?

A. 6-7-8.

R. D. Q. 191. Turning over the page what date did you give at the top of the next page?

A. 11-9-1915.

R. D. Q. 192. What dates follow on that page?

A. 10-11-13-14-15.

R. D. Q. 193. Please state whether or not in this book the numbers on the left hand column refer to the order numbers that you use in reporting to the home office?

A. Yes, sir.

R. D. Q. 194. State whether or not on the page headed "12-4-15" the number begins at "718" and runs consecutively down to the Knowles transaction?

A. They do run consecutively.

R. D. Q. 195. What is the order number of the Knowles transaction?

A. 736.

R. D. Q. 196. Turn to the paper which you just obtained
383 from the home office and give the number of that order?

A. 736.

R. D. Q. 197. Give the amount on your memorandum book of that sale?

A. $49.29.

R. D. Q. 198. Also the amount as taken from the order?

A. $49.29.

R. D. Q. 199. State whether or not the transaction you have referred to in the order number 736, Knowles, $49.29, is the same transaction which is contained on that order No. 736 that you just obtained from the home office?

A. It is.

Re-recross-examination:

By Mr. Bradford:

R. X Q. 200. Did you ever make any calls on Mr. Knowles when you did not sell him a bill of goods?
A. I did.
R. X Q. 201. Several?
A. Two, I think.

Deposition closed.

HENRY E. STARRING.

At 12.35 p. m. a recess was taken until 1.30 p. m.

At 1.50 p. m.

Present: Parties as before noted.

CHARLES S. ROGERS, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your age?
A. Thirty-two.
384 Q. 2. Where do you reside?
A. Grand Rapids, Michigan.
Q. 3. What is your occupation?
A. Salesman for William R. Warner & Company.
Q. 4. State consecutively but briefly your connection with the drug business from the start?
A. My first connection with the drug business was with S. E. Wells & Company, where I stayed for about two years, beginning about fourteen years ago. Then after two years I went to Foley & Company and stayed there for about two years. Both of those concerns dealt in proprietary medicines. Then I went with H. E. Buckman & Company in the proprietary drug business in Chicago. I was with them about nine years, selling. Then I went with William R. Warner & Company about three years ago, August, 1912. My territory is now Western Michigan. This includes all of the lower peninsula except Detroit and certain counties which Mr. Starring now covers. Prior to that I had Central Michigan, including Saginaw.
Q. 5. About how many drug stores are there in those territories?
A. About 800 I should say, in my present territory.
Q. 6. About how many in the preceding territory?
A. About 500.
Q. 7. How often do you call on your druggists?
A. Some once a year, some twice a year, some every four months.
Q. 8. Do you get around among substantially all of them or only a percentage of them?
A. The good ones at least twice a year.

Q. 9. Do you really visit substantially all the druggists in your territory?

A. Yes.

Q. 10. Do you visit dispensing doctors and to what extent?

A. I visit them not to any great extent, perhaps would not average more than three or four a week.

Q. 11. State whether or not there is a market for chocolate quinine preparations in your territory?

A. No great market.

Q. 12. Why not?

A. Very little quinine used.

Q. 13. Not much malaria?

A. No malaria.

Q. 14. On what calls over the counter could Quin-Coco be dispensed?

A. To cover up quinine, syrup of Quinine, or as a baby tonic, two grains of quinine to a teaspoonful of chocolate.

Q. 15. Any other calls?

A. Not that I have in mind.

Q. 16. Can a retail druggist, if he chooses, push the sale of any particular drug or preparation, and if so, how?

Mr. Bradford: Objected to as leading and immaterial.

A. By suggesting, if a man has a cold, he would need something along the line of cough syrups.

Q. 17. Any other way?

A. Not that I have in mind.

Q. 18. Will you state whether or not he could do anything along that line with his doctor, if he choose?

Same objection by Mr. Bradford.

A. By suggestion, writing prescriptions for some particular items that they carry in stock.

Q. 19. Do you know instances of drug manufacturing houses who push their sales largely through such efforts on the part of the retail druggists?

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. We have some items that are effected that way in the Pfeiffer Chemical line—profit paying items for the dealer.

Q. 20. My question is whether you know of any houses who very largely push their products through such efforts on the part of the retail druggist?

Same objection by Mr. Bradford.

A. Not largely with our house. We have a general line, do not spend any particular time on any one item—try to sell the complete line.

Q. 21. When you became employed by William R. Warner &

Company as a drug salesman, who gave you instruction as to your duties as such?

A. Mr. Hagaman, assistant sales manager.

Q. 22. Where?

A. Saginaw, Michigan, or Detroit I will say, Detroit first.

Q. 23. Detroit first and then Saginaw?

A. Detroit first, then the next visit I would say Saginaw.

Q. 24. State whether or not he gave you a copy of the Salesman's Confidential?

A. He did.

Q. 25. What instructions did he give you with regard to the use of that so far as it set forth the sales policy of the house?

A. He told me that the instructions on the policy of the house would be found in the back.

Q. 26. Did you read them?

A. I did.

Q. 27. State whether or not you became then familiar with them?

A. Not all.

Q. 28. State whether or not he gave you any instruction as to the moral questions in salesmanship and what your moral duty would be?

A. He did not.

Q. 29. Will you turn to the Confidential, pages 86 and 87, and point out which one, if any, of the teachings there cover moral ground?

A. "That it pays to adhere strictly to the truth at all times"; "It does not pay to speak ill or even mention your competi-
387 tors"; "That it does not pay to make miscellaneous promises"; "We believe in honesty and fair dealing"; "We never speak ill of a competitor."

Q. 30. At the time you became employed there did you understand these rules and what they meant?

A. Yes.

Q. 31. Will you state whether or not you have acted upon them in your work for the house?

A. I have.

Q. 32. If a retail druggist had a prescription or a call over the counter for a given preparation made by a particular house, and he dispensed in either case a similar preparation made by an entirely different house, state whether or not this would be honest business on the part of such druggist, in your opinion?

A. No, sir.

Q. 33. Will you state whether or not in your opinion that is the accepted ethical point of view in the retail drug business?

A. Yes.

Q. 34. If a retail druggist should dispense in such a case a similar drug of another house, will you state whether or not in your opinion he is an honest druggist?

A. I would not think so.

Q. 35. If a drug salesman should suggest to a retail druggist that he could do that sort of thing, state whether or not you would consider him an honest salesman?

A. I would not.

Q. 36. What do you know about Bertram A. Wright?

A. I know that he is a Saginaw retail druggist.

Q. 37. Did you ever offer to sell him goods at his drug store?

A. Yes.

Q. 38. How far back did you solicit his trade?

A. I couldn't say exactly.

388 Q. 39. State whether or not it was soon after you went with the house?

A. I worked Saginaw soon after I went with the house.

Q. 40. Do you know anything about Wright's stocking a chocolate quinine preparation that was sold under the name of Hobson?

A. Yes.

Q. 41. What do you know about that?

A. The preparation was bought by Mr. Wright before I made the territory, and I remember of having sold him Hobson's Chocolate-Quinine, three dozen lots.

Q. 42. Who put this out?

A. The Pfeiffer Chemical Company.

Q. 43. Was it part of your line?

A. Yes.

Q. 44. How is it put up?

A. In 2 and 3 ounce bottles.

Q. 45. State whether or not it was sold over the counter in the original bottles?

A. Yes.

Q. 46. How much quinine to a dose did it contain?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Two grains of quinine to the teaspoonful of chocolate.

Q. 47. State whether Wright handled Quin-Coco before you sought his trade?

A. I don't know—that is you mean the chocolate quinine package—the Hobson package?

Q. 48. No, state whether he handled Quin-Coco before you sought his trade?

A. I don't know.

Q. 49. Will you state whether or not you ever offered Bertram A. Wright Quin-Coco and told him that it was a preparation of quinine the same as Coco-Quinine?

A. I did not.

389 Q. 50. Bertram A. Wright, when called for plaintiff, testified:

"Q. 13. If you have no calls for Quin-Coco, how did they expect you to sell it?

A. Sell it as sweet quinine or Coco-Quinine."

Will you state whether or not you ever made any such suggestion to Wright, viz., that he could sell Quin-Coco as Coco-Quinine?

A. I did not.

Q. 51. Wright testified:

"Q. 14. Did or did not Warner & Company's representative tell you that when Coco-Quinine was called — you could supply the demand with Quin-Coco

A. Not directly. I told him that I would not supply it on prescription, but when people came in and called for Coco-Quinine I would possibly sell them Quin-Coco."

State whether or not such conversation ever passed between you?

A. Wright never said that to me

Q. 52. Wright testified:

"Q. 16. Have you sold Quin-Coco when Coco-Quinine has been called for in your drug store?

A. Yes, from that and prescriptions.

Q. 17. In doing so were you or were you not following the instructions of the representative of Warner & Company?

A. Warner & Company's representative told me I could sell it the same as Coco-Quinine, there was no distinction."

State whether or not you ever gave such instructions or made such a suggestion to Wright?

A. I say that conversation never came up between Wright and myself.

390 Q. 53. When you were working your line, and particularly Quin-Coco, what did you say to him about Quin-Coco?

A. Nothing particularly—a matter of selling a special five-gallon offer that we had. I have taken up the price of Coco-Quinine along with the other prices of the other goods in gallons, to make up the special five-gallon offer.

Q. 54. Coco-Quinine?

A. In comparison—in competition with——

Q. 55. Were you selling to Wright Coco-Quinine or Quin-Coco?

A. Quin-Coco.

Q. 56. Were you selling him Coco-Quinine in connecton with your other gallon articles or Quin-Coco with the other gallon articles?

A. Quin-Coco.

Q. 57. Will you state whether or not in offering him Quin-Coco you proceeded to compare it with Coco-Quinine?

A. I might have mentioned the price of the two items.

Q. 58. Have you a regular practice in regard to how to offer your articles to a retail druggist and how to put them before him?

A. We had a special proposition always in connection with the general line.

Q. 59. When you approach a particular item in the general line how do you put the proposition before him as to that item?

A. In different ways. We have Sloan's Liniment, that we have an actual demand for. We have King's New Discovery, which we have an actual demand for.

Q. 60. How do you put it when it is Quin-Coco?

A. I sell but very little Quin-Coco in my territory.

Q. 61. What do you know about Albert F. Knowles?

A. I know that he is a retail Saginaw druggist.

Q. 62. Was he in your territory?

A. He was.

391 Q. 63. Have you ever solicited his trade?

A. I have.

Q. 64. When?

A. The last call in March, 1914.

Q. 65. Knowles, when called as a witness for plaintiff in this case, testified that you had called on him in the fall of 1914. State whether or not this is true?

A. It is not true.

Q. 66. What leads you to say so?

A. Because my last visit to Saginaw was in March, 1914, the territory having been changed at that time.

Q. 67. Albert F. Knowles, when called as a witness for plaintiff, also testified as follows in answer to Q. 8:

"A representative of William R. Warner & Company introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of Coco-Quinine when I could use his product at a cheaper price."

What do you say as to ever having made such a statement to Knowles?

A. I will say that I never made that statement to any dealer—not good business, not the policy of the house.

Q. 68. Knowles also testified:

"Q. 11. Please state what, if anything, the representative of William R. Warner & Company said to you with reference to the dispensing of this product called Quin-Coco on call? I mean on call for what?

A. For Coco-Quinine or Chocolate-Quinine, Syrup-Quinine, or where the syrup of quinine is used."

Please state whether or not you ever made such statement to Knowles?

A. I did not.

Q. 68. Knowles, in answer to X Q. 28, testified:

"He took a sample of Quin-Coco from his grip and asked
392 me if I handled that product. I said 'No, I have always used Coco-Quinine for all such calls.' He said, 'Well, don't you think you could handle this to your advantage?' I said, 'I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to use the Coco-Quinine.' Then he stated the price that I was paying for the Coco-Quinine and that I could use his product and save the dif-

ference. I told him, 'No, I would continue with the Coco-Quinine as it always gave the best satisfaction.' "

What have you to say as to whether or not that transaction and conversation took place?

A. I will say that I never had that conversation with Knowles.

Cross-examination.

By Mr. Bradford (beginning at 2.40 p. m.):

X Q. 69. Will you please state what conversation you had with Mr. Knowles with reference to the product called Quin-Coco?

A. I had no conversation with Mr. Knowles in regard to Quin-Coco.

X Q. 70. The subject of Quin-Coco was never mentioned between you at any of your calls?

A. No, sir.

X Q. 71. In what way would you discuss the subject of Quin-Coco with any dealer when the subject came up for discussion?

A. There is very little Quin-Coco used in my territory, there is but very little Coco-Quinine or Quin-Coco used in my territory—a discussion never comes up.

X Q. 72. You sell some of it, do you not?

A. Very little.

X Q. 73. But you do sell some?

A. Very little.

X Q. 74. To whom have you sold Quin-Coco?

393 A. Dispensing doctors only to my knowledge.

X Q. 75. Never sold any Quin-Coco to a retail druggist?

A. Not that I remember of.

X Q. 76. Never solicited a retail druggist for an order of Quin-Coco?

A. Not in my territory that I remember of.

X Q. 77. You mean in your present territory?

A. In my present territory.

X Q. 78. Did you ever solicit an order for Quin-Coco in your former territory?

A. The business I say was already made for me in Saginaw when I made that.

X Q. 79. By whom?

A. By the former salesman.

X Q. 80. What was his name?

A. Before me was Mr. Grimaldi, Mr. Berkeley.

X Q. 81. Is that all?

A. Yes.

X Q. 82. When did you first read the rules to which you have referred in the back of the Salesmen's Confidential?

A. Upon receipt of it.

X Q. 83. When was that?

A. When I started to travel for William R. Warner & Company

X Q. 84. Have you still the copy of the Salesmen's Confidential you had at that time?

A. Yes.

X Q. 85. Have you the copy with you?

A. No, sir.

X Q. 86. Have you ever been furnished any other copies since then?

A. No.

X Q. 87. How long after you began work for William R. Warner & Company was it that you solicited the order of Mr. Wright?

A. I don't remember.

394 X Q. 88. Did you ever solicit an order from Mr. Wright more than once?

A. I called on him more than once.

X Q. 89. Did you ever call on him to solicit an order?

A. I never called on this dealer but that I was after an order.

X Q. 90. When was the last time you were in Saginaw?

A. For these purposes?

X Q. 91. For any purpose?

A. I stayed over Sunday there about four weeks ago.

X Q. 92. When was the last time you saw Mr. Knowles?

A. In March 1914.

X Q. 93. You had no conversation with him since?

A. No.

X Q. 94. How do you fix this date?

A. I have it in my expense book.

X Q. 95. When was the last time you saw Mr. Wright?

A. In March 1914.

X Q. 96. You have had no conversation with him since?

A. No.

X Q. 97. As I understand your testimony, you regard it as dishonest to represent to a druggist that he can use any product as a substitute for any other product called for or prescribed, is that true?

A. Yes.

X Q. 98. And you have never sold any of your products to a druggist or solicited an order on the representation or suggestion that he might use your product in the place of another product called for?

A. No.

X Q. 99. That has been your invariable rule?

A. Yes.

X Q. 100. What else did Mr. Hagaman offer you besides 395 the Salesmen's Confidential in the way of documents?

A. Nothing that I remember.

X Q. 101. Were you given a list known as the "Blue List?"

A. Yes.

X Q. 102. For what purpose was that used?

A. Comparative prices.

X Q. 103. What do you mean by comparative prices?

A. Comparative prices.

X Q. 104. Won't you please explain still further what you mean by comparative prices—comparative with what?

A. Different manufacturers.

X Q. 105. As between what products of different manufacturers?

A. I don't remember any particular one.

X Q. 106. Does not the list give the product of your house which is intended to take the place of the product of the other house, as well as the price of your product compared with the price of the product of the other house?

A. I have never considered it that way.

X Q. 107. Is it not a fact?

A. I don't think so.

X Q. 108. What does the information on the list convey to your mind?

A. Comparative prices.

X Q. 109. There is nothing of information on that list so far as you are concerned except the information concerning prices?

A. No.

X Q. 110. That is all that you can see of significance of that list?

A. That is all I have ever used it for.

Cross-examination closed at 2.53.

Deposition closed.

CHARLES S. ROGERS.

396 STONEWALL JACKSON NOTTINGHAM, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your age?

A. Thirty-nine.

Q. 2. What is your residence?

A. Atlanta, Georgia.

Q. 3. What is your occupation?

A. Drug salesman for William R. Warner & Company.

Q. 4. State consecutively and briefly your connection with the drug business from the first?

A. I started in in Macon, Georgia, with Massenburg, a retail druggist, eighteen years ago. Then I went with Mallory H. Taylor, Macon, Georgia, retail druggist, as a prescription clerk. I stayed there for about two years, and then went to Savannah, Georgia, with Livingston's Pharmacy, retail druggist and prescription man, and stayed there about seven and a half years. Then I came to Atlanta with the Elkin Watson Drug Company, Atlanta, in the same capacity, prescription clerk. I stayed there three years. I then went with Estes & Company as drug salesman, and was there for a short while. They were selling drugs wholesale. Then I went with H. K. Mulford & Company, of Philadelphia, drug manufacturers, and stayed with them for nine months, and then with William R. Warner & Company, and have been with them about seven years as drug salesman—wholesale drug manufacturers.

Q. 5. You have been in the drug business in one way or another ever since you began, have you not?

A. Yes.

Q. 6. What is your present territory?

A. Central Georgia, including Atlanta, Columbus, Savannah, August, Macon and the territory between these towns.

Q. 7. If you had a different territory previously, what was it and when?

397 A. I worked South Carolina and Georgia only for a short while, six years ago, the Piedmont section. I worked a little Georgia and western North Carolina. That was only for a short while.

Q. 8. When you joined the Warner House did you receive any instruction on your duties as salesman and from whom?

A. From Mr. H. Pfeiffer.

Q. 9. Where?

A. In Atlanta, Georgia.

Q. 10. Immediately after you joined the house?

A. Yes.

Q. 11. Did he give you a copy of the Confidential?

A. He gave me that, it was sent to me with the outfit.

Q. 12. Will you state whether or not he took it up with you?

A. The policy of the house, to be honest, and fair, and never to speak ill of a competitor. He has always said, never to mention a competitor.

Q. 13. Do you mean that he gave you those instructions?

A. Yes, those were his instructions.

Q. 14. Will you state whether or not you have endeavored to act up to those instructions?

A. I have carried out his instructions.

Q. 15. If a retail druggist on a prescription or a call over the counter, specifying a given preparation made by a certain house, should dispense a similar preparation of a different house, state whether or not you consider that as honest on the part of the druggist?

A. I think it is dishonest; I know it is dishonest.

Q. 16. Will you state whether or not you thereby express the ethical standard of honesty in a drug business?

A. It is dishonest, where a specification is given, not to supply what is specified.

Q. 17. Is that the ethical standard of the retail drug business?

A. That is the way I understand it.

398 Q. 18. If a salesman should suggest that sort of thing to a retail druggist in offering him goods, will you state whether or not you consider that would be honest on the part of the salesman?

A. It would be dishonest to suggest replacing one article for another; where one is specified it should always be given.

Q. 19. Will you state whether or not that has been your standard?

A. That is my standard.

Q. 20. What do you know about William A. Jolly?

A. He was formerly a retail druggist in Marshallville, Georgia—in bankruptcy now.

Q. 21. Did you ever solicit his custom?

A. Yes.

Q. 22. How long had you known him to be in business there?

A. He was in business about two years.

Q. 23. How old a man would you consider him?

A. I thought he was under age. I was told that one house would not ship him on account of him being under age, but I notice he says he is 23.

Q. 24. How often did you call on him?

A. An average of every three months, three or four times a year.

Q. 25. What did you offer him?

A. I tried to sell him our entire line, went through the whole line.

Q. 26. About how many items?

A. Fifteen or twenty—sometimes could not sell him that many.

Q. 27. I mean to ask you how many items you had for sale?

A. I went over our entire line whenever I could get his attention.

Q. 28. About how many items have you in the line?

A. Are you speaking of the——

Q. 29. Entire line?

399 A. Different formulæ of pills and tablets and elixirs in a pharmaceutical line—would run the items away up possibly, possibly 3,000 different items.

Q. 30. William A. Jolly, when called as a witness for the plaintiff, testified:

"Q. 20. Did he say anything about whether or not you could use it to supply the demand for Coco-Quinine?

A. He did."

Will you please consider that he was referring to Quin-Coco and state whether or not you said that to Jolly?

A. I did not.

Q. 31. William A. Jolly testified in answer to X Q. 30:

"A. He said, 'How are you fixed on Coco-Quinine?' I looked over my stock and found I was low. He offered me a product by the name of Quin-Coco, at a very much better price than Coco-Quinine, claiming that it was the same as Coco-Quinine. He said that 'You can use it for Coco-Quinine.'"

State whether or not Jolly's statements just read are true?

A. I have never suggested to him or to anyone else replacing Coco Quinine with Quin-Coco.

Q. 32. He states in the answer just read to you certain remarks that you made to him. Will you say whether or not you made those remarks to him?

A. I did not. One thing right here, I said that was cheaper than a great many others, was cheaper than a good many other chocolate quinine preparations on the market.

Q. 33. Will you state whether or not there are other chocolate reparations on the market that you ran across in competition?

A. A dozen or more.

00 Q. 34. Can you name them?

Mr. Bradford: Objected to as immaterial, incompetent and irrelnt.

A. H. K. Mulford, H. K. Wampole, Tilden & Company, Massenill & Company, G. F. Harvey Company—that is enough.

Q. 35. State whether or not you were in competition more or less your territory with these various houses on that chocolate quinine roduct?

Mr. Bradford: Same objection.

A. All of them sell it and of course there is competition.

Q. 36. William A. Jolly testified:

"X Q. 47. Did Nottingham make you any proposition that day hich you considered dishonest?

A. Yes.

X Q. 48. Please give the words he used in that connection? I hought you had told me that you had already stated the entire conersation in your answers to my questions.

A. When he told me that you could use Quin-Coco for Coco-Quinne."

State whether or not you made Jolly at any interview any proposition hich you considered dishonest along the lines of dishonesty as you ave above stated them?

A. I did not. I did not make that proposition to him. That ould have been a dishonest proposition. I would not know how o approach a man and suggest to him substitution.

Q. 37. Jolly testified:

"X Q. 51. Did he mean anything more than that you could use it n calls for 'Chocolate Quinine' or 'Quinine Syrup'?

A. Yes.

X Q. 52. What more did he mean?

A. As a substitute for Coco-Quinine."

01 State whether or not you made any statements to Jolly to the effect that he has there testified?

A. I did not. I supposed that he had a regular demand, which he as, for chocolate quinine, and which all druggists have, that is in he South, and was trying to sell him Quin-Coco to supply that deand. I tell everyone that Quin-Coco is thinner, is easier to handle han a great many of the other preparations on the market, and I ould not have suggested him replacing it, because it is a thinner reparation than the one that he states here, that Coco-Quinine—I anted him to use in the place of it.

Q. 38. Jolly testified in answer to X Q. 55:

"A. He said that Quin-Coco was the same as Coco-Quinine and could be sold as Coco-Quinine.

X Q. 56. Did he use the word 'substituted'?

A. I don't remember.

X Q. 57. Did he tell you that Quin-Coco could be sold as Coco-Quinine without informing the doctor or the customers calling for Coco-Quinine?

A. He did."

Please state whether or not you made those statements to Jolly?

A. I did not.

Q. 39. William H. Jolly testified also in answer to X Q. 84:

"A. To the best of my knowledge it was represented to me to be used as a substitute. The word 'substitute' may have been used, but at the same time it was made plain enough to me that you could use Quin-Coco as a substitute for Coco-Quinine."

Please state whether or not that testimony of Jolly is true and whether or not you said those things?

A. That is not correct.

Q. 40. Will you state whether or not there is a market for chocolate quinine preparation in your territory and on what sort of calls?

402 A. The majority of it is sold over the counter on calls for syrup of quinine, chocolate quinine, sweet quinine.

Q. 41. What have you to say about customers calling on a druggist asking for a remedy for some suggested ailment?

Mr. Bradford: Objected to as leading and immaterial.

A. There are a lot of demands—a druggist has varied calls for quinine, and this chocolate quinine is very popular, because it is not as unpleasant as a good many other preparations of quinine.

Q. 42. Can a retail druggist, if he chooses, create a market for a given drug or preparation?

Mr. Bradford: Objected to as immaterial.

A. He can create a market for anything he desires by pushing it.

Q. 43. Among whom?

Mr. Bradford: Same objection.

A. Among the laity; he can create a demand among doctors, just by pushing any certain article, he can create a demand for it.

Q. 44. Do you know of any drug houses whose products are largely marketed through the special efforts of retail druggists?

Mr. Bradford: Same objection.

A. A good many of the houses—the Santox Company—they only have one agent in a town. The Rexall, the United Drug Company only have one agency. The Nyal have more than one agent, but they are all special agents. Sometimes in larger towns they have several in a town.

Q. 45. How are their products pushed?

Mr. Bradford: Same objection

A. Through the druggists' efforts.

403 Q. 46. Do the druggists buy from those houses and then sell what they bought from them?

Mr. Bradford: Same objection.

A. They buy and then sell what they buy from them.

Q. 47. Do the same druggists who push the Rexall line for instance also sell other products?

Mr. Bradford: Same objection.

A. They sell a general line of drugs.

Q. 48. Will you state whether or not the sales of the products of these special houses are large in bulk?

Mr. Bradford: Same objection.

A. Some stores sell a lot of these special lines.

Q. 49. I meant rather to ask you whether the concerns such as you have mentioned, for instance Rexall and Nyal, do a large business in the way you have specified?

Mr. Bradford: Same objection.

A. They do a large business, yes.

Q. 50. How long do you generally stay with a customer in showing him your line?

A. It depends altogether on circumstances—twenty to sixty minutes.

Q. 51. Covering the entire line?

A. Try to cover the entire line.

Q. 52. Will you state whether or not you make any special push on any particular item in the line?

A. I push all of our products.

Q. 53. How good a seller is Quin-Coco in your territory?

A. It is fairly good, but is not a big seller.

Q. 54. To what extent do you visit dispensing doctors?

A. I go to see them wherever I think they are good for what I sell them—cut them out a whole lot of times.

Q. 55. Can you approximate the number of dispensing doctors in your territory?

404 A. I would say 400 or 500.

Q. 56. Can you approximate the number of druggists in your territory?

A. Eight hundred, about, in that neighborhood.

Q. 57. Have you sold Quin-Coco to dispensing doctors?

A. Yes.

Q. 58. Have you any definite method of practice in taking up with a retail druggist a proposition to sell him Quin-Coco, that is how do you put it up to him?

A. I ask him how is their stock of Quin-Coco, and if they ever handled it before, or chocolate quinine—I would say, "How is the chocolate quinine?" They have a regular demand for it right over the counter, for chocolate quinine. I gave the labels there of several of them. That is the way they get rid of it. A good many doctors prescribe it, preferring it to any other make.

Q. 59. If it is a new customer on Quin-Coco do you say anything else to him?

A. If it is a new man that does not know anything about it I will show him a sample of it and tell him about its being thin, containing two grains of sulphate of quinine to the teaspoonful approximately, and that it is the best preparation of chocolate quinine on the market I think.

Q. 60. State whether or not you have seen labels in drug stores prepared in the particular drug store indicating chocolate quinine?

A. I was talking last week to Hicks Drug Company in Dublin—they said that 90 per cent. of their trade was just calls for chocolate quinine, and that they did not believe that 2 per cent. of the people knew that Lilly made a chocolate quinine, they did not know who made it, just called for chocolate quinine.

Q. 61. State whether or not you have seen any druggists' labels bearing the words "Chocolate Quinine?"

A. Yes, often.

405 Q. 62. Kept on hand by the particular druggist?

A. As I said, Hicks Drug Company there, Louisville Drug Company, Thomas Drug Store in Macon—numbers of labels all around the territory.

Q. 63. Bearing what words?

A. Chocolate quinine.

Q. 64. State whether or not you have had any market for Quin-Coco in two-ounce or four-ounce bottles?

A. A lot of people prefer it that way on account of it being so convenient to sell it to druggists to retail. There are numbers that sell it that way in my territory.

Q. 65. You mean that you have sold Quin-Coco in such bottles?

A. Yes.

Q. 66. To what extent?

A. I have sold a good deal of it around my territory. I sell more in gallons than I do in that way.

Q. 67. Will you state whether or not those small bottles of two and four-ounce capacity are sold to the customer in the original bottles?

A. Sold in the original package.

Q. 68. When sold in the original package will you state whether or not they bear the original Searle & Hereth label as Quin-Coco?

A. They have that label, yes.

Direct examination closed.

Cross-examination.

By Mr. Bradford (beginning at 3. 40 p. m.):

X Q. 69. Do you remember having any conversation with Mr. olly at all on this particular subject?

A. I have talked to him every time I have been to Marshallville. was just going through the line, selling him. He has always been ery pleasant to me, but I never suggested as he says to use Quin-oco in the place of Coco-Quinine.

X Q. 70. What did you suggest to Mr. Jolly in this particular respect?

A. I sold him Quin-Coco only one time, sold him that for his call for Chocolate Quinine, that is the way I sell it to all drugg-sts, either for calls for Quin-Coco or Chocolate Quinine, which here is a big demand for.

X Q. 71. A big demand for what?

A. Chocolate Quinine.

X Q. 72. What preparation did you first know of in the drug side which answers this description?

A. I think that—I cannot say positively, but I think that Coco-uinine was the first one I knew of.

X Q. 73. Was this product handled in the drug stores where you ere formerly employed?

A. Yes.

X Q. 74. Was it frequently asked for by customers as chocolate uinine?

A. Choolate quinine, yes. Practically very few people call for oco-Quinine. The majority of them call for chocolate quinine. am speaking of the laity.

X Q. 75. As a prescription clerk, how were the prescriptions you written for it as a rule?

A. Some would specify Lilly, Coco-Quinine, Lilly. Some doctors rite for chocolate quinine.

X Q. 76. A good many write just for Coco-Quinine?

A. I have prescriptions for Coco-Quinine, Lilly.

X Q. 77. Also Coco-Quinine without the name Lilly?

A. I said the majority of the cases specified it, in some instances s not.

X Q. 78. You say that you have never represented to Mr. Jolly or anyone else that Quin-Coco could be used to supply the demand Coco-Quinine?

A. I did not.

X Q. 79. Or could be substituted for Coco-Quinine?

A. I did not.

X Q. 80. Or used as a replacer for Coco-Quinine?

A. I never mentioned Coco-Quinine.

X Q. 81. Even in comparing your product with the——

A. I say it is a better preparation, mine is, it is smoother, thinner, can be poured out of the bottle easier.

X Q. 82. You know that is largely a matter of fiction, do not?

A. I don't think so.

X Q. 83. A point that is used to persuade the druggist to buy?

A. I think it because it is just my judgment of it, that I know of it.

X Q. 84. Do you think there is sufficient difference between the consistency of the Quin-Coco and the Coco-Quinine to be detected by the laity?

A. Yes, it could be detected by anyone that knew anything about the two preparations, knew anything at all about that, because one being thinner than the other one, you can certainly detect it.

X Q. 85. You state positively that Mr. Jolly stated untruths in all of his statements concerning what you said to him on this subject?

A. I do,—not in every instance. I told him that that was a cheaper preparation, cheaper in price than any other on the market that I knew of. You take a great many are four dollars, where mine is $3.75, so he is correct there, but as far as getting him to use that in the place of Coco-Quinine, I did not.

X Q. 86. You stated that this product could be dispensed on calls for quinine, quinine syrup, syrup of quinine, sweet quinine, chocolate quinine, etc. As a retail drug clerk, will you state whether or not customers and doctors frequently called for Coco-Quinine?

A. Our customers did not, that was——

X Q. 87. Customers never called for Coco-Quinine?

A. I would not say that they never called for it, but it was not frequent.

X Q. 88. Why do the majority of retail druggists label their product Coco-Quinine that goes out to the customers in your territory?

A. I don't know that they do.

X Q. 89. You have never investigated that?

408 A. Not the majority, I do not know that they do label it——

X Q. 90. Don't you know that druggists in your territory keep stocks of labels printed Coco-Quinine, fill their bottles out of Quin-Coco bottles and put Coco-Quinine labels on them and sell them to the customers as Coco-Quinine?

A. No, I don't know any such thing.

X Q. 91. About what are your annual sales of Quin-Coco?

A. They are small. I have never figured on the annual sales; they are not much.

X Q. 92. How many gallons would you say you had sold during the present year, 1915?

A. Just roughly I would say possibly a hundred gallons, possibly not that much.

X Q. 93. That includes dispensing physician as well as retail druggists?

A. That includes the sale, that includes my entire sale.

X Q. 94. When did you interview the druggists referred to concerning their labels bearing the name Chocolate Quinine?

A. I asked one of them a week ago, just about a week, told him I would like to get a label of chocolate quinine, and he said, "I am

just out of them in the drawer, I don't think I have any more, I will soak a label off the bottle." He had a great many bottles put up with chocolate quinine. He said, "I will soak the label off" and he did. Another one,—I got a label from him just December 24th. He put up, has been putting up chocolate quinine a long time, labeling it that. He has put it up himself at the store.

X Q. 95. In your "Salesman's Confidential" which was furnished you seven years ago, did you find the code of ethics and give it careful study and consideration?

A. Yes, I have gone over it. It has been changed from time to time, but practically the same meaning.

409 X Q. 96. When was the last change made?

A. Possibly two years ago.

X Q. 97. Did Mr. Henry Pfeiffer travel with you any in your territory?

A. Yes.

X Q. 98. And was with you when orders were solicited for items of your line?

A. Yes.

X Q. 99. Did he participate with you in the sales?

A. He sold himself, either Mr. H. Pfeiffer or myself, when he was with me, one or the other would do the selling.

X Q. 100. Do you recall any of the towns that were visited by you in company with Mr. Henry Pfeiffer?

A. Yes,—Barnesville, Georgia, and Macon, Georgia.

X Q. 101. Do you remember when this was?

A. About six years and six months ago.

X Q. 102. Do you remember any of the druggists to whom you sold goods on that visit at that trip?

A. Yes.

X Q. 103. Will you give the names of some of them?

A. John H. Blackman, Barnesville; South Side Drug Store, Macon.

X Q. 104. Any others?

A. I recall those two.

X Q. 105. Was Henry Pfeiffer with you on more than one trip?

A. No, sir. He came through there—I was thinking about another time, but he was just passing through there,—Atlanta.

X Q. 106. Do you say that you never represented to any druggist that any of the items in your line might be used by them as replacers or substitutes for products of other houses?

A. I have never suggested substitution. What would you think if you were a druggist and I came in to you saying that when you get a prescription or specification for a certain thing, to use

410 another? You would not have much confidence in me.

X Q. 107. Is that all your answer to my question?

A. I never did.

X Q. 108. In speaking of your line that you discussed with Mr. Jolly, containing about fifteen to twenty items, I presume you intended to refer to the items which you were endeavoring to sell him at that visit?

A. No, the items sold—there have been different times—that is a question that absolutely cannot be answered correctly, because traveling and going through with eight or ten druggists sometimes a day, you couldn't tell whether you sold a particular customer in the course of six months, you could not tell whether you sold him twenty articles or thirty, but just say the average run of the order would be twenty items.

X Q. 109. But you made no distinction in your line of one item over another?

A. Went the whole thing, right through.

Cross-examination closed at 4 p. m.

STONEWALL JACKSON NOTTINGHAM.

VICTOR M. MOON, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your age?

A. Thirty-seven years.

Q. 2. Your residence?

A. Fredericksburg, Virginia.

Q. 3. What is your present business?

A. Salesman for William R. Warner & Company, Philadelphia.

Q. 4. State consecutively but briefly your successive steps in the drug business?

A. I began the retail drug business about twenty-four years ago in Greensboro, North Carolina, in the retail drug business
411 with S. S. Haithcock. I stayed there about three months. Then I attended school, went to Cabool College, in South Missouri. I was tending school when I went in this store. I spent two years there. Then I came back East and tended school in Richmond, a Richmond high school. I left there and began in the drug business for the Owens & Minor Drug Company, wholesale druggists, Richmond, Virginia, in one of their branch stores known as the People's Drug Store. I remained there approximately two years. I became assistant registered drug clerk there while in their employ, and acted as a prescription clerk. I left there and went to Alexandria, Virginia, and was there only temporarily, just a short time, as relief clerk in the retail drug business, and I went back to Richmond and was employed by Edgar Shine, since deceased, Richmond, Virginia, as a drug clerk. I left there and went to Hampton, Virginia, employed by G. G. Congdon as a drug clerk. I became a full, registered drug clerk while under their employment in the State of Virginia. From there I went to Newport News, Virginia, with Bilisolly & Bilisolly. From their employment I went with the old William R. Warner & Company, owned by William R. Warner, Jr. I began June 7th, 1901.

Q. 5. You have been a drug salesman all the time?

A. Yes, continually in the employment of the reorganization as

well as the old firm. By reorganization I mean the time when the Pfeiffer Brothers became connected with the firm, August, 1908.

Q. 6. What is your present territory?

A. With the exception of Frederick County, Virginia, I have all east of Roanoke, Virginia,—that is the southwestern strip I have relinquished, in April I think it was. Approximately I have had the same territory ever since the Pfeiffer Brothers came to Philadelphia. I have taken Richmond, Norfolk, Alexandria, Portsmouth and Newport News, Petersburg, Lynchburg, Roanoke, Danville and City Point.

412 Q. 7. How many retail druggists approximately are there in your territory?

A. I would say approximately 600.

Q. 8. How often do you visit them on the average?

A. About every three or four months approximately.

Q. 9. How many dispensing doctors do you visit?

A. I visit a good many up there, the different sections of Virginia, southwest Virginia have a good many dispensers, some in Eastern Virginia, some in my home town. I couldn't say exactly the number.

Q. 10. Is there a market in your territory and has there been since 1907 for a chocolate quinine preparation?

A. Yes, a good deal of demand, I have found, and I have created a good deal of demand by starting a great many using the preparation Quin-Coco, I might say, our preparation in particular.

Q. 11. How many different drug manufacturers have chocolate quinine preparations in your territory?

Mr. Bradford: Objected to as immaterial.

A. About half a dozen that I have competition with, there are some 12 or 14 on the market.

Q. 12. Name what you can of them?

Mr. Bradford: Same objection.

A. Henry S. Wampole has a preparation; Burrough Bros., of Baltimore, have a preparation; National Drug Company and G. S. Harvey people particularly have one, and the American Druggists Syndicate have a preparation—they have 23,000 members in the United States, I guess, using some of them; Henry K. Wampole has a preparation, Philadelphia; Mulford has a preparation and of course Lilly has a preparation which I have some competition with. They are all I have in my mind for the moment that I have spoken of.

Q. 13. On what kind of calls in retail druggists is there a market for Quin-Coco?

413 A. There is quite a little. A great many dispensing physicians of course who run drug stores buy Quin-Coco and sell it. There are a great many retail druggists that buy it and sell it as chocolate syrup of quinine, go so far as to have their labels printed, of which I have specific instances in mind. I even have

physicians to specify Quin-Coco, S. & H., the Searle & Hereth, and there has been quite a demand created for chocolate syrup of quinine, you might say, in the same light that a great many other pharmaceutical articles have been put on the market, and popular even to the extent of the druggist and physician as contributory factors.

Q. 14. Can a retail druggist, if he chooses, push the sale of any particular preparation or drug, and if so, how does he do it?

Mr. Bradford: Objected to as immaterial.

A. He can, he can do so. He can popularize it, he can sell Quin-Coco, he can sell any chocolate syrup of quinine he cares to sell. He can sell tasteless syrup of quinine if he chooses to sell it. Very often people come in, and want quinine, especially in the malarial places. Of course in the western part of Virginia they sell very little anyway, but in the eastern places, they will very often come in and say, "My little Willie has a cold." They can put up ten cents' worth of any chocolate syrup of quinine or a quarter's worth.

Q. 15. How about pushing it among doctors?

Mr. Bradford: Same objection.

A. I have a specific instance in mind. Some time ago I was in a drug store in the South side, Virginia, and the doctor came in, who is a good friend of mine, using other preparations of ours. The druggist said to him, "Here is a chocolate syrup of quinine, we can buy it for $3.75 a gallon," and he said, "Can you use some of it?" He said, "Yes, be very glad to use it." "Can you use a gallon?"

"I think we might get rid of a gallon." So he bought a gal-
414 lon. That is possible oftentimes. I have done a great deal of detail work of course on Warner's pharmaceutical preparations in the past fourteen years and seven months, and in pushing my goods, I very often go to the points, as "Doctor, do you use a good deal of chocolate syrup of quinine?" and they are using our other preparations. I said, "We have the smoothest and best chocolate preparation on the market today, containing two grains of sulphate of quinine to the teaspoonful." When I say it is the smoothest and best chocolate syrup on the market, I am backed by my customers, who say they would rather have it provided the price is the same, than a great many others. Incidentally of course I have physicians who use Quin-Coco, S. & H. By "detailing" I mean calling on physicians personally. I have called on hundreds of physicians down in that section.

Q. 16. When you go forth to sell your line, how many items are you selling?

A. There are approximately about 15,000 in their combined lines, I think, 14 lines of preparations, that we control, that is to the drug trade. Of course there are only two lines sold to the physician.

Q. 17. State whether or not it is your practice to push any particular preparation especially or to push the entire line?

A. I try to push preparations which the house makes a profit out of, and in particular specialties that I have been detailing and selling

for years. Of course I try to sell the whole line wherever possible,—be very glad to give these customers some of all of them if he would take them.

Q. 18. How long do you spend on the average with each retail druggist?

A. If he is inclined to purchase my goods, I cannot spend less than an hour with him. Sometimes it takes two hours, and it has been as much as three. They will average of course about an hour with the customer.

415 Q. 19. You have been with the house of William R. Warner & Company for fourteen years and seven months continuously?

A. Yes.

Q. 20. Please state what you understand from the house to be its policy in regard to honesty of dealing with the trade?

A. Honesty, square dealing, has been my experience with them, and a strict injunction from the beginning, with William R. Warner, Jr., as well as the present management,—square dealing, fair dealing, honesty is the best policy, always with my trade; not to stuff any orders, send any orders strictly that were taken or sold, and to always protect the interests of the house, the customer's interest, and my own.

Q. 21. Did you have any particular instructions from the new management when the Pfeiffer Brothers came in, on these questions?

A. Yes. Our idea is to cultivate the interests of our trade, incidentally treat them squarely and fairly, with an honest policy, which I tried to follow.

Q. 22. Will you state whether you have received any instructions, and have any practice, as to competitors?

A. I cannot say especially that I have specifically. My idea has always been to forget my competitors and try to sell my goods. I very seldom mention a competitor because it is very bad policy. I find it advertises my competitor and not myself.

Q. 23. Have you seen the "Salesman's Confidential" and read the last two pages?

A. I have glanced over it from time to time, yes,—I cannot say in detail or minutiæ.

Q. 24. If a retail druggist had a prescription or a call over the counter for a particular preparation, specifying the maker thereof and dispensed a similar preparation made by another maker, state whether or not this is honest business on the part of the retail druggist?

416 A. It is not. If a specified order comes for a specific preparation, that preparation should be given.

Q. 25. Do you know whether you are now expressing the best ethical standards of the retail drug business?

A. I am.

Q. 26. How far does that represent your standard personally?

A. It conforms to my idea of good business, good business policy, good, honest policy to begin with.

Q. 27. If a drug salesman suggested to a retail druggist that he

could do that sort of thing, will you state whether or not you consider that drug salesman an honest salesman?

A. I consider him a dishonest salesman. I have gone so far as to have a customer to ask me very often whether a preparation that was specified on prescription, if he did not have that preparation, could he use something else, and I have told him not to do so, to use that specific preparation if it called for a specific maker.

Q. 28. What would you consider the policy as a business proposition of a salesman who should suggest that sort of thing to a retail druggist?

A. I should consider it suicidal myself, as far as business went.

Q. 29. What do you know about Edgar B. Allen?

A. I think that I first ran across him approximately fourteen years ago. He was clerking for Mrs. Sterling at that time, a widow, who owned a drug store on Church Street in Norfolk. He afterwards married the widow and is clerking in this drug store now for Mrs. Allen. I quit calling on him for several years under the old management on account of reasons, I did not care to call on him on his account, under the present management I have sold him quite a few orders more recently. Mrs. Sterling does the buying in the store. Mr. Allen clerks for Mrs. Allen now. It runs under the name of Sterling's Pharmacy. They had two drug stores, one at
417 Ocean View, a branch store at Ocean View and the main store was Church Street. I have sold them several orders in the past two or three years.

Q. 30. Have you called on him on any occasion when Mrs. Allen, who did the buying, was absent?

A. Yes.

Q. 31. How often?

A. I remember specifically one instance.

Q. 32. Edgar B. Allen, when called as a witness for the plaintiff, testified as follows:

"Q. 10. Have you ever been solicited to buy the product called 'Quin-Coco' and sold by him, and what did he say?

"A. Mr. Moon, the representative of William R. Warner & Company, on several occasions has offered us a preparation which he called 'Quin-Coco,' which he stated we could use the same as 'Coco-Quinine,'' and that it would be almost impossible to tell it from 'Coco-Quinine.'

"Q. 11. Who did he say, if anyone, could not tell it from Coco-Quinine?

"A. That the physician couldn't distinguish it, that the products were identical.

"Q. 12. Did he say whether or not the patient could tell the difference?

"A. The patient would be impossible to tell the difference for the reason that the patient don't know what he is getting."

Please state whether or not the statements there attributed to you by Edgar B. Allen are true, whether you said those things to him?

A. No, I did not make the statement in that light as stated.

Q. 33. Please state what parts of what he attributed to you you did not say?

A. I solicited the business on chocolate syrups of quinine,—"How are you fixed on chocolate *sryup* of quinine?" And he stated
418 that their physician specified Lilly's Coco-Quinine and could not use our preparation. I then asked him if he did not have sale over the counter for chocolate syrup of quinine, a great many people bought chocolate syrup of quinine. He stated no, they used nothing but Lilly's, as the only article they kept in stock, and that ended the matter.

Q. 34. Please state what part of the statements attributed to you you did not make?

A. To begin with I did not say that a physician could not distinguish the difference. I did state we used a smoother and better syrup of quinine than any on the market, which you did not have to break the neck off the bottle to get out. It was not lumpy, nor you did not have to break the neck off the bottle probably to get it in, that it was smoother and better than what the physicians wanted, that it was two grains of sulphate of quinine to a teaspoonful,—and better for a therapeutic value and physiological effect. That is my selling points on our Quin-Coco.

Q. 34. Allen testified in the questions and answers which I have read to you above, that you "stated we (he) could use the same as Coco-Quinine, and that it would be almost impossible to tell it from Coco-Quinine." State whether or not you said that?

A. I did not say so.

Q. 35. Allen testified in effect that you said it would be impossible for the patient to tell the difference between Quin-Coco and Coco-Quinine. State whether or not you said that?

A. I don't remember. I could have stated that what the patient wanted was the benefit of the two grains of sulphate of quinine disguised with other ingredients and a chocolate syrup in connection, because the chocolate does not disguise the quinine sulphate.

Q. 36. State whether or not you ever sold Allen personally any goods for that pharmacy?

A. I have not.

Q. 37. How long did that interview with him when he was alone last?

A. I have not found him alone but once, and that was
419 since this testimony was taken down there. Mrs. Allen was out of the store and he made an engagement, told me to be around next morning by 8.30, and she would be there. She was away in the afternoon,—down at the Ocean View store, the branch store. That was on August 30th, 1915, and he said that the testimony had been taken and that he went through a gruelling for two solid hours, and incidentally that he was absolutely neutral, that nothing was said that was detrimental to me or my firm.

Q. 38. State whether or not you called on Allen about one year ago from last May 21st?

A. A year from May 21st?

Q. 39. Yes, about a year from May 21st, 1915?

A. I called on him April 16th, 1914, or rather the order was dated April 16th, 1914. I called on the man September 12th, 1914, May 12th, 1915, and August 30th, 1915. Mr. Hagaman was with me at that time, our Assistant Sales Manager I mean at the visit of May 12th, 1915. He did the selling and I did the putting down of the items on the order pad.

Q. 40. Was Mrs. Allen there that day?

A. Mrs. Allen was there that day, yes, I remember it very distinctly.

Q. 41. Edgar B. Allen also testified:

"R. D. Q. 26. And at that time as I understand your deposition, he stated that it was practically identical with Lilly's 'Coco-Quinine' and could be used the same as Lilly's 'Coco-Quinine,' and that the physician could not tell the difference. Is this correct?

"A. Mr. Moon, not knowing on his first visit our objection to substitution, did offer us 'Quin-Coco,' but we refused to buy same. He at that time stated 'Quin-Coco' was a preparation which could be dispensed in place of 'Coco-Quinine.'

"R. D. Q. 27. And that the physician could not tell the difference?

"A. Yes, he did."

420 Please state whether or not you made those statements to Allen?

A. I did not.

Q. 42. Allen in answer to R. X Q. 29 testified as follows:

"A. Mr. Moon came to us a perfect stranger and I do not know what he thought our standard as to substitution was. From his conversation at that time he led us to believe that we could use 'Quin-Coco' instead of 'Coco-Quinine' without detection."

Please state whether or not there was anything in your conversation with Allen or Mrs. Allen that could lead them so to believe?

A. I was not a total stranger to begin with. On selling the first order, after several years interim, Mr. Allen was absent. On my first order from Mrs. Allen (Mrs. Sterling), in which she gave me the order, and Mr. Allen was not there, I was not a stranger to Mrs. Allen, or Mrs. Sterling. I was not a total stranger, that is absolutely untrue. He was not present on my first visit there when I sold Mrs. Allen.

Q. 43. State whether or not at any subsequent visit at which he was present you said anything which would properly have led him to believe that you made any suggestion to him that you could use Quin-Coco for Coco-Quinine without detection?

A. I did not.

Direct examination closed.

Cross-examination.

By Mr. Bradford (beginning at 5.08):

X Q. 44. Please explain what the memorandum is in your hand which you have referred to in the course of your answers to direct questions?

A. Memorandum, merely dates of invoices which I took this morning, showing when the goods were sold, different dates
421 I have been selling these people. There is the memorandum (showing paper to examining counsel).

X Q. 45. Taken from what?

A. Taken from files of which I have copies of the orders, at home, in my trunk, or some other place. I retain copies of all orders, carbon sheet, triplicate.

X Q. 46. You also used the memo, in making your answers as to the interview with Mr. Allen which took place in August?

A. Yes, sir. There is the date. I called on him the other day and sold him again.

(Counsel for defendant hands to counsel for plaintiff.)

X Q. 47. I understand then that in your answers to Mr. Rawle's questions, where you have given the dates of your calls on Mr. Allen, you have obtained these dates from the records in the files of the home office here in Philadelphia?

A. Not all of them. I have them right in my mind, made when Mr. Hagaman was with me, absolutely. I think that in all probability I can show where—I can prove that I have a memory of that date very distinctly, because it was a rainy morning when I was there, and Mr. Hagaman was with me, and he left in the afternoon to catch a boat home. I remember all about it, anything you want to ask about it.

X Q. 48. (Question repeated.)

The Witness: Not necessarily, merely to substantiate what I had in mind.

X Q. 48. Then why did you refer to the memorandum in your hand?

A. He asked me there about certain dates. Of course to be more specific I had to necessarily have the memorandum when I first began selling the customer. I could not remember each visit exactly altogether.

X Q. 49. And you obtained this memorandum from the records in the home office?

422 A. From a copy of my order, yes.

X Q. 50. When did you make this memorandum?

A. I copied it down this morning.

X Q. 51. You state that you did not say either to Mr. Allen or in his presence anything from which he could infer that you intended

to have him understand that Quin-Coco could be used in the place of Coco-Quinine?

A. I did not.

X Q. 52. Do you say that you never have represented or suggested to anyone in your territory that they could buy Quin-Coco and use it the same as Coco-Quinine?

A. I have not suggested so, no, sir.

X Q. 53. Did you ever suggest to anyone that Quin-Coco was capable of being used as Coco-Quinine or sold as Coco-Quinine?

A. I have not said so.

X 54. Did you ever suggest to any customer that any of your products might be bought and sold for other products of other concerns?

A. I stated this to a customer when they had a prescription, and the other item was specified, to give him that item.

X Q. 55. What druggist asked you the question relative to using one product when another was specified on prescription?

A. The Chestnut Avenue Pharmacy in Newport News, Virginia—Mr. Dunn as manager, asked me only the other day if he could,—what he should use. He had his prescription there, said, "What would you use there?" Another item was specified. I said, "Give him that item and charge him accordingly." That is strictly the honest policy.

X Q. 56. Mr. Allen states at the beginning of his deposition that he is one of the proprietors of the Sterling Pharmacy. You refer to him as a mere clerk?

A. As Mrs. Allen's husband, yes. Mr. Allen stood there,
423 saw when the order is put down, each time. He might do some suggesting in the business, but he does not do the buying.

X Q. 57. Do you deny the truthfulness of this statement that he is one of the proprietors of the store?

A. He has a working interest in the store, yes, and he may draw a salary from the business, but Mrs. Allen owns the business.

X Q. 58. Do you know this of your own knowledge of merely from hearsay?

A. It appears to me that from hearsay and from observation, and from calling on these people. Mrs. Allen formerly owned the store, that is Mrs. Sterling, for several years, to my knowledge for fourteen years and seven months approximately, and Mr. Allen is working at the store for her. So far as his putting money in the business, I could not swear that he did or did not, but Mrs. Allen does the buying, and I am quite positive owns the business. She has several grown children who were badly opposed to the match when it came off, so I am sure that Mrs. Allen yet owns the business.

X Q. 59. You make the positive statement then merely on your conclusions from these circumstances?

A. Yes.

X Q. 60. You stated in answer to the question respecting questions 10, 11 and 12 that you did make the statements as stated in that light. How did you make the statements?

A. No, I did not make them in that light.

X Q. 61. I asked you in what light you did make them?

A. I suggested our preparation of Quin-Coco as a chocolate syrup f quinine containing two gains of sulphate of quinine to the tea-poonful, that there was quite a lot of Quin-Coco or chocolate syrup f quinine sold over the counter and that I would judge that he had ome business on the same line. He stated, "No, we only have sale for the one", and that he did not care to stock any of my 24 preparation. So I passed on to the next item.

X Q. 62. What do you mean by a statement with reference o your product, that it is not necessary to "break the neck off the ottle", and so forth?

A. A great many of my customers, one in mind specifically, as ell as others, have stated to me at times that they preferred our reparation at the same price or at a higher price than others, on ac-ount of its being smooth and not lumpy, and that it was easy to pour ut of a bottle or pour in a bottle, which is agreed by those who dis-ense it.

X Q. 63. What preparation would you compare it with?

A. I might mention several that are sold, very, very few of them. might mention specifically—Mulford's is one. One of my cus-omers had some of it and he was not able to get it out of the bottle, nd I did not get around in the season,—he buys five gallons at a ime, so of course he bought this other, and I presume he yet has ome of it on hand, and I might say that Lilly's is not as easy to pour ut of a bottle or as smooth a preparation, which I think is true from ny small pharmaceutical knowledge of about 24 years, that it is a reparation—our preparation, Quin-Coco, is more smooth and satis-actory than any of them, aside from price.

X Q. 64. If chocolate does not disguise the taste of the quinine, hat does disguise it?

A Yerba Santa is the only true disguising agent of the quinine ulphate. You take amorphous quinine, it i not so hard to disguise t. The sulphate of quinine is very bitter. A good many of my cus-omers have wasted a good deal of chocolate and quinine to make a uccessful preparation, not putting anything in but the chocolate yrup and the quinine sulphate. I might suggest here that Yerba anta—being a practical druggist—was used for a great many years efore any chocolate syrup of quinine that I knew were on the market.

25 X Q. 65. What chocolate syrup of quinine did you first know of on the market?

A. The first one that I knew much about was Quin-Coco in my elling experience. I really did not know of it. Of course we ac-uired the Searle & Hereth line. I was with the old Warner Com-any and under the new management of course samples were sub-itted to me and I gave away a few. Incidentally it was brought o my attention by my customers, by observations and other means hat we had the best chocolate syrup of the bunch, and I think so oo, and I want to go on record as saying so.

X Q. 66. Did you not know of the Lilly preparation?

A. I have heard of it, yes, but I got the business, I was getting the business, and naturally I presume that is on account of the animus shown. I got my share of the business on chocolate syrup of quinine and a little bit larger share I presume than anybody in the territory. Everybody in the State of Virginia carries Quin-Coco S. & H. Repeat orders have come from them, it causes them to use more. The hypnotic influence of a Warner salesman is not there. The consequence is, they order of their own volition, not on account of my say so.

X Q. 67. About what quantity of Quin-Coco do you sell annually?

A. I would judge, just by a guess, 400 gallons.

X Q. 68. Have you sold about 400 gallons during the present year, 1915?

A. I think so. I have placed approximately 2,000 gallons of it, I guess.

X Q. 69. Since when?

A. Since I began selling, about five years ago, approximately. It was brought to my attention—I really did not know we had it for some time until it was shown to me and my attention was called to it.

X Q. 70. Before the William R. Warner & Company was consolidated or taken over by the Pfeiffer Chemical Company, had you any knowledge of Coco-Quinine, Lilly?

426 A. I had seen very little of it.

X Q. 71. Had you heard of it in the drug trade in your territory?

A. I had heard of it, yes.

X Q. 72. Had you ever heard of any other chocolate syrup of quinine before you heard of Coco-Quinine Lilly?

A. I cannot say on that point, I don't remember.

X Q. 73. Was not Coco-Quinine, Lilly, a pharmaceutical product of a fairly good reputation with a fairly good demand while you were with the Warner Company?

A. It had some demand, yes, but it was not excessive, it was not very great, not in my territory. Of course it might have been in some other sections of the country, but I only know very largely Virginia and North Carolina. I have traveled some other sections to some extent, but more particularly those two States. Of course I gave up North Carolina when the old management went out. That was the closing of my experience in North Carolina.

X Q. 74. Is it not true that Coco-Quinine, Lilly, is recognized by yourself and others familiar with the trade as the original product of this character?

A. Not necessarily so, I don't know that. I don't know who originated chocolate syrup of quinine, whether Searle & Hereth did or not. I know they sold a good deal of it before we took the line over. After we took it over I heard they sold a good deal of it in the southwest, in Texas.

X Q. 75. Searle & Hereth sold a good deal of it?

A. Quin-Coco, S. & H.

X Q. 76. Who told you this?

A. Mr. Moore, who traveled Texas for a good many years, and I think lived in the same town where Lilly's representative lived at that time. Of course that has been a good while ago. I don't know whether they live in the same town now or not.

X Q. 77. Name the druggist where the incident took pace that you said that the physician stated he could use the Quin-Coco
427 when the druggist asked him about it.

A. W. A. Keeling, Keyesville, Viriginia. Dr. Bayly was the physician. I don't remember his initials.

X Q. 78. In the documents furnished wou from the home office, was there a document which was commonly referred to as the Blue List?

A. I don't know anything about a Blue List. What do you think of specifically?

X Q. 79. Some have referred to it as a substitute list or a replacer list, but out of respect to the defendant we call it "Blue List" (handing paper to witness)?

A. Yes, sir; I have seen that before, had one with me.

X Q. 80. Did you use it?

Mr. Rawle: Objected to as not proper cross-examination.

A. I do not now, very seldom refer to it, because my memory is very good sometimes and I do not need it.

X Q. 81. You found it useful when it was first furnished?

A. Useful to some extent in comparing prices, yes. In comparing prices it came in handy,—relative preparations.

Cross-examination closed at 5:30 P. M.

Redirect examination.

By Mr. Rawle:

R. D. Q. 83. The memorandum which you had in your hand with some dates on it, you said was made from the records of your sales in the home office. State whether or not those were your own sales orders made out in your own handwriting on the day when you made those sales respectively, or on the next day?

A. You mean whether made yesterday or today?

R. D. Q. 84. No; what you said before, were they the original orders?

428 A. Original order, yes, order for the goods; no copies, original order in my own handwriting, out of the folder.

R. D. Q. 85. Made out what day?

A. When I took the orders?

R. D. Q. 86. Yes, same day.

A. Yes, same day and mailed the same night.

Re-direct-examination closed.

Recross-examination.

By Mr. Bradford (beginning at 5:35 P. M.):

R. X. Q. 87. And the pencil memorandum is a copy made by you from those original orders?

A. Yes. I took the folder out myself, put it right out on a table and looked those over, made notes of them just simply as a matter of convenience, if you want specific dates.

R. X Q. 88. You remember distinctly the date of your last interview, August 12th, with Mr. Allen?

A. Yes, because he told me you people had been there and interviewed him,—what a trying ordeal it was for a couple of hours, that Mr. Lilly's salesmen waited on the store while the depositions were taken.

R. X Q. 89. Anything else?

A. He told me of course what I have stated to you. He stated that he was absolutely neutral, nothing said detrimental to me or my firm, and he made an engagement the next morning for his wife, and she would do the buying for the store.

R. X Q. 90. He spoke of giving his deposition as a "grueling," did he?

A. Somewhat, yes.

Re-cross-examination closed at 5.36 P. M.

Deposition closed.

VICTOR M. MOON.

The meeting adjourned until Wednesday, December 29th, 1915, at 10 o'clock A. M.

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Philadelphia, Pa.,
Wednesday, December 29, 1915—10 A. M.

Present: Parties as before noted.

HENRY K. MULFORD, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?

A. Henry K. Mulford. Age, fifty. Residence, St. Davids, Delaware County, Pennsylvania. Occupation, manufacturing pharmacist.

Q. 2. State the name of your concern, and how long you have been connected with it

A. H. K. Mulford Company. We started in 1888; twenty-seven years. I have been connected with it all that time. I personally started the business. The business and plant are in Philadelphia and in Glenolden, and branches through practically all the large cities, and in foreign countries.

Q. 3. Broadly speaking, what class of medicinal preparations do
on manufacture?
A. Pharmaceutical and biological products chiefly.
Q. 4. State whether or not the business is large?
A. Of considerable size.
Q. 5. Are you and have you been for some years the president
f the company?
A. No, I have always been the vice-president of the company.
Q. 6. Who is the president?
A. Mr. Milton Campbell.
Q. 7. Will you state whether or not you are both actively engaged
in the general business of the concern?
30 A. Yes. The officers have been the same since the busi-
ness was organized. As a matter of exactness, the business
as a private business for about three years, then it was incorporated,
nder the laws of Pennsylvania.
Q. 8. Are you familiar with the business of manufacturing and
elling drugs and medicinal preparations of the kind you have men-
ioned throughout the United States?
A. Yes.
Q. 9. Will you state whether you have been in more or less close
usiness touch with the other large houses?
A. Yes. Do you mean by that close business touch, or compe-
ition? We have been in competition with them and in close touch,
oth.
Q. 10. Have you been in competition with them all?
A. Yes.
Q. 11. State whether or not when one drug manufacturer has
ut on the market an open formula preparation which has been
uccessfully on the market, other drug manufacturers have put out
preparation of a similar or like formula? To what extent, if any,
as this been common practice among the drug manufacturing
ouses?
A. It has been general. It has been the general custom.
Q. 12. Can you explain or illustrate to what extent this has been
he common practice?
A. It is the usual practice. It has been ever since the so-called
legant pharmaceuticals have been on the market. Take elixir or
on, quinine and strychine, and Beef, Wine and Iron, two of the
rst known elegant so-called, pharmaceuticals, put out by Wyeth.
very house is manufacturing them. Practically all the line of
lixirs started the same way. Take tablets. We originated a num-
er of formulas and introduced them as specialties, claimed no rights
of *proprietaryship* and no secret composition, but put them
31 out as original formulas, sampled them and detailed them,
introduced them through salesmen, special advertising, spe-
al literature. If you take any of the catalogues of the manufac-
rers you will find that in practically every one of those the tablets
e appropriated and some trade name used, and in many instances
ey have affixed their own name to it, as though they were the

ones that introduced the formula, when quite the reverse is the fact. I speak of tablets more particularly because we specialized on tablets for a number of years. Therefore, I feel more qualified to speak on that particular line of pharmaceutical products.

Q. 13. How far has this practice that you speak of extended to all classes of medicinal preparations?

A. I know of no exceptions, sir. It takes all syrups, elixirs, wines, cordials, ointments, suppositories, effervescence salts, and all the allied pharmaceutical preparations.

Q. 14. Will you state to what extent this applies to all the drug manufacturers of the country?

A. I do not know an exception. All of us are generous in appropriating the other man's formulas, if you choose to put it that way. If you want specific instances of the facts I nave stated, I will give them to you.

Q. 15. To what extent does this practice apply to the use of the same name as was used by the original producer?

A. If it was a coined name, I do not think any manufacturer would think of appropriating the name, but if it was a descriptive name or if it was a common name, there are no compunctions, of course, in using it.

Q. 16. Will you state to what extent, if any, this practice that you have mentioned, extends among the drug manufacturers to what are known in the trade as "specialties"?

A. The practice is uniform. It extends all through. It is not limited. Frequently, if a formula is once introduced under a certain name, they will put it up in a little different dress, or
432 even keep the same formula. Never, however, is their any attempt to my knowledge of the reputable houses to copy the style of package of the competitor.

Q. 17. Will you state to what extent this has been the practice of your house?

A. It has been our practice.

Q. 18. Do you know how far it has been the practice of the Eli Lilly & Company?

A. The same as the others.

Q. 19. To what extent are you familiar with The Eli Lilly and Company catalogue and the line of goods they manufacture and sell?

A. I know the list.

Q. 20. Can you give instances from the Eli Lilly & Company catalogue, which I hand you, of that having been the practice of the plaintiff in this case, The Eli Lilly & Company? I hand you the Lilly catalogue of 1913-1914.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Do you want me to mention the names?

Q. 21. Yes.

A. There is a preparation known as "Anti Constipation, Lilly." That was a formula that was introduced by H. K. Mulford & Co.

pany under the name of "Anti Constipation," H. K. Mulford & Company. That is on page 83 of the catalogue. I notice this is marked as being supplied on all "unspecified orders."

"Bronchitis," page 90, originally introduced by H. K. Mulford & Company, our own formula. These that I mention are preparations that were originated or introduced by our house. That was the first published formula. We first made the tablets. They were never known on the market. No such preparation had ever been placed on the market, and, as I stated in the beginning, they
433 were made specialities by our house. Incidentally, you might introduce here "Cascara Compound, Hinkle." That is a Warner formula. That was introduced by William R. Warner & Company. That was a formula of old Dr. Hinkle.

"Cathartic, Active," page 97.
"Cholera Infantum," page 99.
"Chlordyne" Tablets, page 99.
"Cold, Preferred," page 101.
"Cystitis, No. 1" and "Cystitis, No. 2," page 103.
"Dermatitis," page 104.
"Digestive, No. 1," and "Digestive, No. 2," page 104.
"Dipsomania," page 105.
"Endometritis," page 107.
"Expectorant, Tonic," page 107.
"Four Chlorides," page 108.
"Fever, Davis," page 108.
"Gallic Acid and Ergotin, Compound," page 108.
"Gastralgia," page 109.
"Gastritis," page 109.
"Guaiacol and Hypophosphites, Compound," page 110.
"Hypophosphites and Quinine, Compound," page 112.
"Hypophosphites and Quinine, Compound, with Creosote," page 112.
"Lupulin and Bromide, Compound," page 116.
"Nitrogylcerin, Compound," page 122.
"Nux Vomica and Ignatia, Compound," page 122.
"Pierotoxin and Belladonna," page 126.
"Sedative, Baer," page 132.
"Tonsilitis," page 138.
"Viburnum, Compound," page 139.

Q. 17. Please pursue your investigation of this Lilly catalogue to part 2, specialties, appearing on page 190.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes. What is your question?
434 Q. 18. See if there are any more items in that list.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. All specialties are practically of the same nature issued by different houses. Take alkaline antiseptics; every house has an alkaline antiseptic. No one house would claim to be the only one manufacturing such a combination. As a matter of fact, they all had their origin from the same proprietary preparations that seemed to have a good deal of usefulness. The main thing distinguishing a business such as we are engaged in is the fact that the formulas are given on the labels, so that the consumer, as well as the physician, knows exactly what he is using or prescribing, and there is no secrecy in the business whatsoever. "Specialties" largely mean the classification in which the articles are placed so as to carry different discounts.

"Gargle, Alkaline, No. 1," and
"Gargle, Astringent, No. 2," page 204.

The same name and the same formula as we introduced.

"Methylene Blue, Compound, Horwitz," page 205.
"Ichthyol-Iodine, Compound," page 208.
"Analgesic Balm," an ointment, page 214.

That is all that I see. Understand, I am not criticising Lilly for taking the same formula. We have done the same thing. That has been the custom.

Q. 19. Please state whether or not I am correct in understanding that all the items of which you have given the names from the Lilly catalogue that you examined, except the "Cascara Hinkle," were originally Mulford preparations, first put out by Mulford and then subsequently put out by Lilly.

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Correct.

435 Q. 20. Will you state whether or not you understand that the respective Lilly items were similar medicinally to the Mulford items?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. The same formula.

Q. 21. How about the names under which they were put out?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. The same names.

Q. 22. I hand you a pint bottle of "Syrup Quinine with Chocolate, H. K. Mulford Company." Please state whether or not that is your product?

Objected to as immaterial, incompetent and irrelevant to prove any issue in -his cause.

A. That is ours.
Q. 23. When did you first put that on the market?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. December 1902.
Q. 24. Have you been manufacturing or selling it continuously since then?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes, sir.
Q. 25. Where?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Throughout the United States, and in export trade.
Q. 26. When you put it out in December, 1902, was it listed?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

436 A. Yes.
Q. 27. And has been ever since?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes, sir.
Q. 28. Was it placed in the hands of your salesmen throughout the United States for sale?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. It was.
Q. 29. And it has been ever since?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Yes, sir.
Q. 30. Will you state whether or not it has a market?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. Oh, yes.
Q. 31. Approximately how good a market?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.
A. We call it a fair seller. I could not give you the volume of business. It is not a large seller, but it sells fairly well. You

notice there is no attempt in this preparation to copy any other preparation in any way, either in the style of package or the label. It has our individual Keystone label on, which all of our products bear.

Q. 32. You mean the keystone shape of the label?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. Yes, sir.

Q. 33. Is the bottle a stock bottle?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

437 A. Yes, sir.

Q. 34. And is the method of wrapping, with transparent paper upon it, an old method?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. All of our preparations are put up that way, yes, sir. It has been done for years.

Q. 35. How far is that paper wrapper common?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. A skin wrapper, we call it.

Q. 36. How far is that skin wrapper common in your business?

Objected to as incompetent, irrelevant and immaterial to prove any issue in this cause.

A. All manufacturers use it.

Q. 37. And have for years?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. Yes, sir, for the reason that it has the advantage of showing the label and saving one label, and yet protecting the label and the bottle.

Q. 38. Please state the standing of the defendant, William R. Warner & Company, in the drug business?

Objected to as immaterial, irrelevant and incompetent to prove any issue in this cause.

A. A very good house, a very reputable house.

Q. 39. Do you know how long they have been in business?

Objected to as immaterial, incompetent and irrelevant to prove any issue in this cause.

A. They have been in business before I started in business I believe, probably for forty or fifty years.

Mr. Rawle: Direct examination closed.

438 Cross-examination, without waiving objections.

By Mr. Bradford:

X Q. 40. You have been familiar with William R. Warner & Company as a manufacturing concern for a good many years?

A. Since a boy.

X Q. 41. Is their reputation in the trade today the same as it was six or eight years ago?

A. I think so.

X Q. 42. As a pharmaceutical manufacturing concern?

A. They are devoting more of their time now to their own specialties, but their reputation, I think, is equally as good.

X Q. 43. Referring to the tablet preparations, when were the most of them introduced, as far as you can recollect?

A. Very early. They were introduced very early in our business, when the tablet machine, which I patented, or invented, rather, was first made, ranging from the years 1890, 1891 and 1892.

X Q. 44. And they have been common property since that date?

A. Yes. Their formula is open, you understand. That formula is given, and it has always been the custom of manufacturers, if they see a formula that is good, and a good preparation for physicians to use or prescribe, to list it.

X Q. 45. Are not many tablet preparations, and some of those you mentioned, merely physicians' prescriptions put up in tablet form?

A. Some of them are, yes, sir. Most of them are.

X Q. 46. Then, they were not original with your house?

A. They were first put up by our house. All preparations, you might say, today that are sold, originally were physicians' prescriptions, and they have been trade-marked and copyrighted and commercialized, so as to make them an article of commerce.

439 X Q. 47. Is that true of Coco-Quinine?

A. I do not know as it is.

X Q. 48. What house first put a chocolate syrup of quinine on the market, so far as you recall?

A. I do not know. I am not familiar with that. The idea of a chocolate syrup of quinine is no different from what it would be if it had a vanilla flavor or sarsaparilla flavor, or any other vehicle for administering a nauseous preparation.

X Q. 49. When your preparation was put on the market in 1902, was it made according to the present formula?

A. As far as I know. That is a matter I cannot testify to because I do not make these formulas. That is, I do not manufacture it. Mr. Stone could testify to that, should you wish to have that substantiated and correct.

X Q. 50. Mr. Stone has already testified in the case as a witness for the defendant stating that when he came to your house in February, 1904, a preparation of this kind was on the market, but that it did not contain yerba santa; that the yerba santa was afterwards added to take the place of licorice. I call your attention to Mr. Stone's testimony, questions 5 and following.

A. Then his testimony should be accepted as correct. I do not need to refer to it, because that recalls the matter to me; because I now remember his submitting this to me a great many years ago. He submitted the formula to me for my approval before it was adopted, stating then that the yerba santa would help remove the bitter taste of the quinine better than the licorice. Understand, the idea of using this base is simply to overcome the bitter taste of the quinine. That is all. There is no therapeutic property, but there is some little food value in chocolate, but it is simply a vehicle for administering the quinine so that it would not be objectionable, to children particularly.

X Q. 51. What agent is used for disguising the taste of the quinine?

440 A. Chocolate, licorice, syrup of licorice and yerba santa have been used for many years. The preparation was made just for that purpose, as an adjuvant or agent for disguising the bitter taste of quinine. Another thing is to use amorphous, or alkaloids, instead of salts. The fact that alkaloids would not be soluble in the mouth, therefore the bitter taste would not be given.

X Q. 52. Have you ever personally tried to disguise the taste of quinine sulphate with chocolate?

A. Yes.

X Q. 53. With success?

A. Not entirely.

X Q. 54. Isn't it a fact that quinine sulphate in chocolate syrup is so bitter as to be impossible as a commercial product?

A. Yes. That is why we do not use it. Groves' Syrup of Quinine, tasteless, to my knowledge was the first preparation that was ever made in which quinine in a fluid preparation was attempted to be administered to disguise the taste.

X Q. 55. Did it contain quinine sulphate?

A. No.

X Q. 56. Isn't it a fact that Lilly's Coco-Quinine was the first quinine sulphate preparation in liquid form, flavored with chocolate that was brought to your attention?

A. I do not remember it.

X Q. 57. Do you recall when your preparation was first put on the market, as to whether or not you had any trouble with it?

A. Yes, in keeping. That is why the small percentage of chloroform, as indicated on the label, was added.

X Q. 58. Do you recall whether or not you had any difficulty in introducing it to the trade on this account?

A. No. Preparations such as this are invariably introduced from the sample and from the formula and price.

441 X Q. 59. And from the detail work of your salesmen?

A. Yes, by your detail work.

X Q. 60. Do you know when your preparation was changed to using the yerba santa in the place of licorice?

A. I think that was about 1904. I cannot testify directly on that unless I look back at our formulas, because these things are a number of years ago. It is the practice in all houses that are aiming to im-

prove their products, that wherever they can find they may make a better product, so far as the adjuvant or the base is concerned, to do it, and such change, of course, always will be indicated on the label.

X Q. 61. Did you ever test any syrup preparation containing quinine sulphate without chocolate?

A. I can hardly answer that question. I presume I have, though, taken sulphate and all other forms of quinine, the most insoluble form being always the most desirable one on account of not yielding bitter taste.

X Q. 62. That is quinine sulphate?

A. Yes.

X Q. 63. Did you ever experiment to make a preparation of this character, using any other syrup as a flavoring than chocolate?

A. Yes.

X Q. 64. With what other syrups?

A. Syrup of orange, syrup of licorice and yerba santa, then using various flavoring agents, wintergreen, sassafras and a combination of flavors. You usually find the nearer you keep to ordinary condiments and flavorings used in cooking the nearer you make a preparation that is acceptable to the larger number of people.

X Q. 65. Such preparations, however, possess the same medicinal or therapeutic value, do they not?

A. Just the same.

X Q. 66. You spoke of the preparations which the Lilly
442 Company have put out similar to formulas put out by your house, as having the same names?

A. Yes.

X Q. 67. Were those names coined names?

A. Not at all.

X Q. 68. Or mere descriptive names?

A. Descriptive names. Just as I stated in my original testimony. No proprietaryship claim to them whatever. In fact, you cannot claim any proprietaryship for a descriptive name. That is impossible. You cannot hold it. You could claim it, but you cannot hold it.

X Q. 69. As I understand it, then, the preparations referred to by you in this respect are common open formulas and known by common descriptive names and used by all manufacturers alike?

A. That is right. I would say here that we have just as much right to use the name "Syrup, Quinine with Chocolate" as any other house, as we would to use "Syrup Quinine with Licorice," or Syrup Quinine with a compound of syrup of sarsaparilla, or any other base we chose to use.

X Q. 70. Is this product sold to the customer in the original package under the original label, as a rule?

A. Invariably.

X Q. 71. To the user?

A. Well, quite considerable, yes. We place this also in two-ounce bottles and in four-ounce bottles, which go direct to the user.

X Q. 72. In respect to your small packages and large packages, which do you sell the most of?

A. I think probably we sell more pints than we do any other size.

X Q. 73. These pint bottles are used by drug stores to dispense there, are they not?

A. Partly, yes, and also sold in the original packages.

X Q. 74. Are you familiar with the prices at which these products are sold?

A. No, I am not.

443 X Q. 75. Not familiar with the prices of your own?

A. Not without referring to the catalogue. I do not know whether our product sells for higher than Warner's or Lilly's, or any other.

X Q. 76. In introducing pharmaceutical products to the trade, is or is not detail work necessary?

A. It is necessary.

X Q. 77. I think you have already stated in one of your direct answers that most ethical preparations are marketed with the formulas printed on the label. Is that correct?

A. Yes, sir. "Ethical" is used as distinguishing it from selling, and as being marketed without false names. There is a great deal in that, too.

Mr. Bradford: Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 78. When you first marketed this product, beginning with December 1902, will you state whether or not it found a market and whether it was a commercial preparation?

A. Yes.

R. D. Q. 79. At that time, as I understand it, it contained no yerba santa?

A. It did not.

R. D. Q. 80. Before you put in the yerba santa did you depend on the chocolate to disguise the bitter taste of the quinine sulphate to any extent?

A. Yes.

R. D. Q. 81. Please state the selling price of your syrup, quinine with chocolate?

A. These are sold in dozen two ounce bottles, $2.25, but the four-ounce bottles sell at $4.00 a dozen. The pint size is sold at $3.75 per dozen pints. $2.00 for five pints and $3.00 per gallon. The idea is to sell, as far as possible, original packages.

444 R. D. Q. 82. Will you state how many salesmen you have on the road in the United States at the present time approximately?

A. One hundred and ninety.

R. D. Q. 83. About how many in 1903?

A. Forty. These are approximately now. I could not be exact without looking at the record.

R. D. Q. 84. You have referred to a number of tablets which your house put out originally and which were put out under the same name by the plaintiff. Will you state whether or not as to those tablets your house created a market for them?

A. Yes, sir.

R. D. Q. 85. Before Lilly put out the same article?

A. Yes, by sampling and by detail work of the salesmen.

Mr. Rawle: Redirect examination closed.

Recross-examination.

By Mr. Bradford:

R. X Q. 86. It is also true, is it not, that many of the products put out originally by Lilly, and for which they had created a market, have been copied by your house and other houses?

A. That is correct.

R. X Q. 87. These, however, are all known as open formula preparations?

A. Yes, sir.

R. X Q. 88. And the market for those preparations is usually created by the detail work of the pharmaceutical manufacturing concerns?

A. Yes, sir.

R. X Q. 89. Through their salesmen?

A. Salesmen and special literature and prices.

R. X Q. 90. The prices given, in answer to Mr. Rawle's question, are your net prices to the retail trade as I understand it?

A. Yes, sir. That is the trade price.

Deposition closed.

HENRY K. MULFORD.

445 S. J. HAGAMAN, recalled, as a witness on behalf of the defendant, having been previously sworn.

Mr. Bradford: Inquiry is made as to the purpose of recalling this witness.

Mr. Rawle: I recall the witness to ask him a few questions along the same line of testimony as has been produced by preceding salesmen witnesses.

By Mr. Rawle:

Q. 1. Do you remember calling on the Sterling Pharmacy in Norfolk, Virginia, and if so, when and how do you fix the date?

A. I remember very clearly calling on the Sterling Pharmacy. It was Wednesday, May 12, 1915. It was about the noon hour when we reached the store and I remember that Mrs. Allen did all the buying.

Q. 2. Who did the selling?

Mr. Bradford: Objected to as immaterial, and further, as improper at this time.

A. I did all the selling.

Q. 3. State whether or not Victor M. Moon was with you at the time in the Sterling Pharmacy.

Objected to as immaterial, and further, as improper at this time.

A. He was. I remember, too, that Mr. Moon had nothing to say.

Q. 4. What did he do?

Objected to as immaterial, and further, as improper at this time.

A. He wrote the order.

Q. 5. Was Edgar B. Allen, the husband of Mrs. Allen, present?

Objected to as immaterial, and further, as improper at this time.

A. Yes, sir.

446 Q. 6. State what was said, if anything, on the subject of Quin-Coco, and by whom.

Objected to as immaterial, and further, as improper at this time.

A. Mrs. Allen did the buying, and all of the products I offered were offered to her. Several times Mr. Allen interrupted and suggested that she buy this or that, but I remember clearly that she told him that she would do all the buying; if he cared to take her place she would step aside. I remember that I asked if they used any chocolate quinine. Mr. Allen replied by saying that they used Coco-Quinine, as their physicians specified it. I then asked him if he did not have some counter calls for chocolate quinine. He replied no. This dismissed the subject of chocolate quinine.

Q. 7. Was anything more said on that subject?

Objected to as immaterial, and further, as improper at this time.

A. Nothing more that I remember, Mr. Rawle.

Q. 8. Edgar B. Allen, called as a witness for the plaintiff, testified in answer to X Q. 19 as follows:

* * * * * * *

"On the visit during May of this year, 1915, in talking of chocolate quinine syrups, he again stated that he had as good a piece of goods as Lilly's and one that could be used for all purposes that Coco-Quinine could be used."

State whether or not you said that to Edgar B. Allen or to Mrs. Allen at that interview.

Objected to as immaterial, and further, as improper at this time.

A. I did not say that, and Mr. Moon had nothing to say.

447 Q. 9. Do you know Robert J. Groves, now a traveling salesman for the plaintiff, who was formerly in the employ of the defendant?

Objected to as immaterial, and further, as improper at this time.

A. I do.

Q. 10. State whether or not you had dealings with him in your capacity as assistant sales manager of the defendant?

Objected to as immaterial, and further as improper at this time.

A. I had.

Q. 11. What was his territory at the time you had dealings with him in that capacity?

Objected to as immaterial, and further as improper at this time.

A. Central Pennsylvania.

Q. 12. Did it include Bristol, Pennsylvania?

Objected to as immaterial, and further, as improper at this time.

A. No, sir.

Q. 13. State whether or not you gave Groves instructions when he first became connected with the house as to the sales policy of the house, and the performance of his duties as salesman?

Objected to as immaterial, and further, as improper at this time.

A. I did.

Q. 14. Where?

Objected to as immaterial, and further, as improper at this time.

A. On the road, and evenings at the hotels.

Q. 15. Where did you travel with him?

Objected to as immaterial, and further, as improper at this time.

448 A. I remember that we worked in Reading. I am giving the visits that I recall that I had made with Mr. Groves. Reading, Pennsylvania, and Pottsville, Pennsylvania. We possibly worked Reading on more than one occasion.

Q. 16. How many days were you with him?

Objected to as immaterial, and further, as improper at this time.

A. From three to six days.

Q. 17. How soon after he came to the house was this?

Objected to as immaterial, and further, as improper at this time.

A. Mr. Rawle, Mr. Groves worked inside for some time, then he went on the road. Just how long that was I don't know.

Q. 18. How long was this traveling with Groves after he became a salesman?

Objected to as immaterial, and further, as improper at this time.

A. I would say from three to six months.

Q. 19. What instructions did you give Groves as to the sales policy of the house?

Objected to as immaterial, and further, as improper at this time.

A. I instructed Mr. Groves always to be honest and fair and not to mention the names of our competitors, as our line was very large and it would keep our salesmen busy selling our goods.

Q. 20. Did you give him a Confidential?

Objected to as immaterial, and further, as improper at this time.

A. I did not give it to him. That goes with the salesman's sample case.

449 Q. 21. He aleady had one?

Objected to as immaterial, and further, as improper at this time.

A. Yes, sir.

Q. 22. While you were traveling with him in his territory and instructing him, did you do the actual selling in the drug store, or did he, or both?

Objected to as immaterial, and further, as improper at this time.

A. Both of us. We varied. Some days he sold and other days I sold. One man he would sell and the other man I would sell.

Q. 23. When you got back to the hotel at night what did you do in the way of instructing him?

Objected to as immaterial, and further, as improper at this time.

A. We worked mostly at nights. In training our men I would take possibly two out of six nights to spend at the hotel, going over our salesman's Confidential and Manual, and our Epitome and other catalogues.

Q. 24. Robert J. Groves, when called as a witness, testified for the plaintiff, as follows, in answer to Q. 12:

* * * * * * *

"A. On calling on the druggist if I found that he was a user of Coco-Quinine I used my best efforts to sell him Quin-Coco, pointing out to him that the product was equally as good as Coco-Quinine and cost him less money and could be dispensed on prescriptions and sold over the counter as Coco-Quinine.

Q. 13. On whose authority did you make such statements and representations to the druggists?

A. On the authority of William R. Warner & Co.

Q. 14. By whom were you given the instructions or authority in this matter?

450 A. I am not sure whether it was Mr. Hagaman or Mr. H. Pfeiffer."

State whether or not you ever gave Robert J. Groves such instructions, or such authority?

Objected to as immaterial, and further, as improper at this time.

A. I positively never gave Mr. Groves such instructions. I never gave any of our salesmen such instructions. It is against the policy of our house even to make a suggestion of this nature. Our instructions to the salesmen are not to mention competitors. It would ruin any business to instruct salesmen this way.

Q. 25. State whether or not that method of selling would in your opinion be honest salesmanship?

Objected to as immaterial, and further, as improper at this time.

A. To me, it would be very dishonest salesmanship, and against all modern methods of selling.

Q. 26. Groves referring to "Mr. Hagaman or Mr. H. Pfeiffer" testified as follows:

Q. 16. What did either of them say to you if anything as near as you can recall, in regard to Quin-Coco?

A. That Quin-Coco was an exact duplicate of Coco-Quinine."

State whether or not you ever said that to Groves?

Objected to as immaterial, and further, as improper at this time.

A. I positively did not.

Q. 27. Groves testified:

"Q. 17. Did either of them tell you that Quin-Coco could be used and sold by the druggists as a substitute for Coco-Quinine?

A. Whether they told me or not I always understood and sold it as a substitute for Coco-Quinine."

451 State whether or not you ever made such a statement or gave such instructions to Groves?

Objected to as immaterial, and further, as improper at this time.

A. I never did.

Q. 28. Groves testified as follows:

"R. D. Q. 85. How did you and Hagaman push Quin-Coco? What did you tell the druggists?

A. We sold Quin-Coco as a substitute for Coco-Quinine, telling the druggists that it was a similar product to Coco-Quinine in appearance and taste, containing the same amount of quinine as Coco-Quinine, and much cheaper in price, one gallon costing $3.75, and Coco-Quinine would cost them in five pints $3.30."

What have you to say as to the statement made by Groves in that answer?

Objected to as immaterial, and further, as improper at this time.

A. I never instructed Mr. Groves to offer Quin-Coco as a substitute for Coco-Quinine, nor did I instruct him, or any other salesman, to tell that to a druggist.

Q. 29. I call your attention to the fact that Groves in the question

and answer just quoted from the plaintiff's record was testifying as to what he, Groves, and you, Hagaman, did when you were pushing Quin-Coco on the road. Please answer the question from that point of view. State whether or not you and Groves pushed Quin-Coco on the road in that way, or other States?

Objected to as immaterial, and further, as improper at this time.

A. We did not. Furthermore, we had too many lines to sell.

452 Q. 30. Which part of his statement given in that answer is true, if any, and which part is untrue, if any?

Objected to as immaterial, and further, as improper at this time.

A. I would say he is correct in so far as the appearance of it goes, the amount of the quinine, and he is correct in that it is much cheaper in price.

Q. 31. Where is he incorrect?

Objected to as immaterial, and further, as improper at this time.

A. He is incorrect in saying that we sold it as a substitute for Coco-Quinine. That simply repeats what I said before.

At 12.55 P. M. a recess was taken until 2.30 P. M.

2.30 p. m.

Present: Parties as before noted.

S. J. HAGAMAN, recalled.

Direct examination resumed.

By Mr. Rawle:

Q. 32. Is he incorrect in any other respect?

(Objected to as immaterial, and further as improper at this time.)

A. He is incorrect in that state, that we sold Quin-Coco as a subsitute for Coco-Quinine.

Q. 33. Groves testified as follows (P. R. 570):

"R. D. Q. 87. My question relates to the statements you have made relative to the sales of 'Quin-Coco' in Bristol. Did you tell

453 the druggists in Bristol that they could use 'Quin-Coco' for 'Coco-Quinine'?

A. Yes."

Please state whether or not you said that or anything like that to druggists in Bistol?

(Objected to as immaterial, and further as improper at this time.)

A. I never told a druggist in Bristol or in any other section that they could use Quin-Coco for Coco-Quinine. I have no recollection

of being in Bristol, however, with Mr. Groves. I do not recall ever having been in Bristol with Mr. Groves.

Q. 34. Was it in his territory at that time?

(Objected to as immaterial, and further as improper at this time.)

A. No, sir; it was not in his territory.

Q. 35. Groves testified in answer to R. X Q. 93 (P. R. 570):

"A. I have heard him tell druggists that 'Quin-Coco' could be sold as 'Coco-Quinine', but where I can not say.

R. X Q. 94. Can you swear that you ever heard Hagaman advise a druggist to buy 'Quin-Coco' and substitute it on calls for 'Coco-Quinine'?

A. Yes."

State whether or not you ever told such things to druggists or advised such things to druggists when travelling with Groves?

(Objected to as immaterial, and further as improper at this time.)

A. I have never told any druggists that Quin-Coco could be sold as Coco-Quinine. I have never advised a druggist or salesman to sell Quin-Coco as a substitute for Coco-Quinine.

454 Q. 36. When there was a new print of the "Confidential" from year to year, will you state whether or not copies of the new issue of the "Confidential" were distributed to your salesmen?

(Objected to as immaterial, and further as improper at this time.)

A. They were distributed, and distributed very quickly to the salesmen.

Mr. Rawle: Direct-examination closed.

Cross-examination (without waiving objections).

By Mr. Bradford:

X Q. 37. How often is the salesman's Confidential reprinted?

A. I would say every two or three years.

X Q. 38. In his testimony Mr. Groves stated that you were not with him at Bristol at the time he was testifying about. Will you state whether or not Bristol was ever in Mr. Groves' territory while he was a travelling salesman?

A. Never, as far as I remember.

X Q. 39. Please name the towns you did visit with Mr. Groves?

A. I remember we visited Reading, Pennsylvania, on several occasions, and Pottsville, Pennsylvania, at least once, and possibly some other towns that I do not recall.

X Q. 40. Mr. Groves testified, in answer to R. X Q. 91, that you travelled with him at intervals during a two years' service, and that the total periods of your travels with him would be about three weeks. How does this accord with your memory as to this fact?

A. I would say that is about correct.

X Q. 41. Do you remember about how many trips you made with Mr. Groves?

455 A. I could not say, sir, exactly on that.

X Q. 42. Your first trip with him was not earlier than three months after his beginning at his employment as a travelling salesman?

A. Not earlier than three months, I would say.

X Q. 43. Not later than six months?

A. That is correct.

X Q. 44. How long was Mr. Groves a travelling salesman for William R. Warner & Company?

A. I have no records really to indicate. That was not in my department, really. I have no definite means of knowing unless I looked it up. It would be a matter of guessing.

X Q. 45. Can you name the towns that were in the territory covered by Mr. Groves during his period of service as a travelling salesman, or the principal ones?

A. I believe I could name the principal towns; yes, sir.

X Q. 46. Please do so.

A. York, Hanover, Harrisburg, Lancaster, Shippensburg, Greencastle, Lebanon and Reading. I am just picking out the important towns.

X Q. 47. And Waynesboro?

A. That would be a small town. I would not remember that. Waynesboro would possibly be in, but it is a mighty small town. Pottsville. That is about as much as I remember, I would say, for the larger towns.

X Q. 48. But you say Mr. Groves never travelled in Bristol?

A. He never travelled in Bristol as far as I remember. Bristol is on the extreme eastern end.

X Q. 49. Do you recall any of the druggists that you visited in company with Mr. Groves in Reading?

A. Yes, sir. I called on Mr. Bell, Mr. Schaich and the Rexall Drug Store. Others that I do not recall.

X Q. 50. Do you recall any druggists that you called on in company with Mr. Groves at Pottsville?

A. I remember Mr. Gorsuch's drug store. I do not know in particular of any others there.

456 X Q. 51. Was any of the product Quin-Coco sold to any of these druggists on any of these visits?

A. Not that I remember. I would say, further, that in Mr. Groves' territory Quin-Coco or chocolate-quinine is a very small seller.

X Q. 52. There is some sold?

A. There is some sold. Very little. Speaking about the Reading trip, I would like to have noted that I remember specially the Reading trip with Mr. Groves, because he had planned to work there about two or three days, and when he was through I consulted the directory and found a good many dealers in the town that he had not called on, and instead of spending two or three days there we spent the week there. I remember that particularly, because it was

quite a surprise to Mr. Groves to find dealers in the town that he had not called on and did not know were there.

X Q. 53. Do you remember discussing the question of Quin-Coco with Mr. Groves?

A. I never remember discussing it.

X Q. 54. Do you remember mentioning Coco-Quinine to Mr. Groves?

A. I never remember it.

X Q. 55. So far as you recall, those two products were never mentioned in any conversation between you?

A. As far as I recall; yes, sir.

X Q. 56. At the time of your call on Mrs. Allen in Norfolk, which I think was May 12, 1915——

A. Yes, sir.

X Q. 57. —you stated that Mr. Moon had nothing to say. Do you mean he absolutely said nothing during the interview at that time?

A. I remember nothing that he said. He was writing the order. He put down the items as I sold them to Mrs. Allen.

X Q. 58. And you did all the talking?

A. Yes, sir; I did all of the talking.

X Q. 59. And you did all of the talking that took place
457 between yourself and Mrs. Allen or Mr. Allen on the subject of Quin-Coco, chocolate-quinine or Coco-Quinine?

A. Yes, sir.

X Q. 60. Mr. Moon did not take any part in this discussion or conversation?

A. No, sir. I remember that visit very clearly to Mrs. Allen of the Sterling Pharmacy.

X Q. 61. You did not say anything to Mrs. Allen in reference to the product Coco-Quinine?

A. No, sir.

X Q. 62. Nor to Mr. Allen?

A. No, sir.

X Q. 63. The name Coco-Quinine did not pass your lips?

A. It did not.

Mr. Bradford: Cross-examination closed.

Redirect examination.

By Mr. Rawle:

R. D. Q. 64. On what part of the premises did the talk with Mrs. Allen at Norfolk take place? In the store part, or in the room back of the store?

Mr. Bradford: Objected to as not re-direct-examination, and as leading.

A. In the store part, in the front store part.

Mr. Rawle: Re-direct-examination closed.

(Deposition closed.) S. J. HAGAMAN.

HARRY FRITSCH, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?

458 A. Harry Fritsch. Age, fifty last September. Residence 2061 Chelten Avenue, Germantown. I am a manufacturing chemist or pharmaceutical chemist.

Q. 2. When did you first enter the employ of William R. Warner & Company?

A. April, 1880.

Q. 3. In the same capacity?

A. Yes, I was in the manufacturing department at 1228 Market Street. I was with them until I graduated at the College of Pharmacy of Philadelphia in 1886. Then I was absent. I left William R. Warner & Company, and I was away ten years working for Smith, Kline & French Company, manufacturing druggists, and then I was with a water company, interested in a water company. In 1896, I went back to the employ of William R. Warner & Company, and I have been with them ever since.

Q. 4. What is the name of your present position in the laboratory?

A. I am foreman of what we term the wet goods department, the manufacture of liquid preparations. I have been in charge of that about for the past ten years.

Q. 5. Do you remember Robert J. Groves?

A. Yes, sir.

Q. 6. Was he in the laboratory under you?

A. Yes, sir.

Q. 7. When did he leave the laboratory?

A. He left us in the latter part of 1908, I think about the month of December.

Q. 8. What was he?

A. He was a helper to me. I had three men that helped, and he was considered one of the helpers.

Q. 9. How old was he then?

A. I judge Mr. Groves was in the neighborhood of twenty-five or twenty-six years old, something like that.

Q. 10. Robert J. Groves, when called as a witness for the plaintiff, testified as follows (P. R. 559):

"Q. 20. Was 'Quin-Coco' manufactured by William R.

459 Warner & Company during the latter part of 1908?

A. During the latter part of 1908 they were experimenting on 'Quin-Coco' in the laboratory as they had not got the working formulas from St. Louis on 'Quin-Coco,' and were unable to make a satisfactory product. I do not recollect whether it was made during the latter part of 1908 or not. During the latter part of 1908 they were experimenting."

Please state whether this testimony of Groves is true, and give the facts?

A. There were no experiments made of Quin-Coco in 1908. In the latter part of 1908 there were no experiments.

Q. 11. When did you get the working formulas from St. Louis on Quin-Coco?

A. I got my working formulas in the early part of 1909.

Q. 12. Groves further testified (P. R. 559):

"Q. 22. Do you know whether or not any 'Quin-Coco' was ever made in the laboratories of William R. Warner & Company, in Philadelphia?

A. Yes, there was 'Quin-Coco' made in the laboratories of William R. Warner & Co. during the latter part of 1908, but whether it was marketed or not, I do not know."

State whether or not these statements are true, and what are the facts?

A. There was not any made in 1908. Positively, no Quin-Coco made in 1908. The first Quin-Coco I made was in 1909. My record cards show 1909, the month of March.

Q. 13. Groves testified as follows (P. R. 560):

"Q. 26. How do you know that the experiments referred to were not the same in color and consistency as the Lilly product 'Coco-Quinine'?

460 A. Because we had samples of 'Coco-Quinine' manufactured by Eli Lilly & Co. before us."

Is that true?

A. No, sir; that is not true.

Q. 14. Groves testified (P. R. 560):

"Q. 27. Were the results of the Warner experiments compared with the Lilly product as the experiments progressed?

A. Yes."

Is this true?

A. That is not true. We did not have, and did not experiment.

Q. 15. Groves testified (P. R. 561):

"Q. 28. Were the efforts in the Warner Laboratory directed to reproducing the identical color and consistency of the Lilly product?

A. I do not know what instructions were received by the superintendent, but I do know that he did his utmost to make a product similar in color to that of the Lilly product."

State whether or not that is true, and what is the fact?

A. It is not true. We made no experiments with Coco-Quinine, and did not compare Coco-Quinine with any preparation that I was making. Positively no experiments made.

Q. 16. Groves testified (P. R. 561):

"Q. 29. Were his experiments considered successful and if not what was the objection to the product he made?

A. His efforts were not a success. So far as I can remember the color was not right."

State whether or not that is a true statement, and give the facts?

A. I made no experiments. Therefore, I could say it is

461 not true.

Q. 17. Groves testified (P. R. 561):

"Q. 30. Did you personally have anything to do with these experiments in the way of assisting the superintendent or consulting with him on the subject?

A. No, nothing to do with the experiments, but when he was doing his experimental work he generally took me into consultation and asked me what I thought of the product, before submitting it to the General Manager."

State whether or not it is true that you made those experiments and submitted them to Groves?

A. I did not.

Q. 18. Groves testified (P. R. 561):

"Q. 31. Do you recall anything that the superintendent said to you on the subject at any of these consultations and if so please state what he said, if you can recall?

A. The only thing I remember the superintendent to say was when the formulas came from St. Louis he found that the chocolate was different from what he was using in Philadelphia."

Please state when the formulas came from St. Louis, and whether that statement of Groves is true?

A. I did not get my formulas from St. Louis until the early part of 1909. The month of March I made my first batch. I had no formula for Quin-Coco in 1908, and when it comes to a difference in color, there were no experiments made, therefore we could not compare any colors.

Q. 19. When the Quin-Coco came from St. Louis, did you receive with it the formula and a bottle of the Quin-Coco made at the St. Louis laboratories?

A. I went to our stock department, and took a bottle from the shelf myself of the S. & H. Quin-Coco.

462 Q. 20. When you made the first batch of Quin-Coco in accordance with the St. Louis formula, state with what, if anything, you compared your product?

A. I compared it with the Quin-Coco, S. & H. bottle, which I had before me.

Q. 21. State whether or not you compared this first batch with a bottle of Coco-Quinine, Lilly?

A. I had not any in the place to compare it with.

Q. 22. In making this Quin-Coco under the St. Louis formula, what did you wish to make it like?

A. To make it like the same product that the St. Louis house

was putting out, because it is our aim to have both houses make identical preparations.

Q. 23. State whether or not you take any steps to standardize the precise color of the cocoa that goes into this Quin-Coco preparation?

A. I do not, no.

Q. 24. How do you buy it? In what quantities do you buy the cocoa?

A. It comes to me in barrels, about 300 pounds.

Q. 25. State whether or not you use it as it comes to you in the barrels?

A. Just as it comes in the barrels, I use it.

Q. 26. Is it the practice of your business to keep a sample of each batch of goods you make?

A. Yes, sir.

Q. 27. Have you done this in regard to each batch of Quin-Coco?

A. Yes, sir.

Q. 28. Can you produce bottles containing samples of the different batches?

A. I produce a bottle of Quin-Coco made under my supervision, No. 38,841, bearing the date 2-5-1914. Also a bottle of Quin-Coco, S. & H., lot No. 42,352, dated 10-20-1915.

Q. 29. State whether or not these samples of each batch, which you have said you keep in the laboratory, are kept under your personal supervision?

463 A. They are.

Q. 30. Will you state whether or not in filling the bottles which you have just produced you filled them yourself from the respective batches of the dates you have placed on the bottles?

A. The bottles were filled by the young men that makes it. I O. K. it. He brings the bottle over to me. So personally, this bottle I did not fill, but I know personally that it came out of that batch, which is recorded on here.

Q. 31. And the same with the other?

A. The same with the other. Every lot that is made, I go through the same thing.

Q. 32. Then, I understand that the bottle marked 2-5-14 is, to your knowledge, filled with this sample of the batch of Quin-Coco of 2-5-1914?

A. Yes, sir.

Q. 33. And the bottle marked 10-20-1915, is to your knowledge, filled with the sample of the batch of that date?

A. Yes, sir. I will state the reason I brought this one (referring to "Defendant's Exhibit, Labatory batch, sample No. 1, T. R. P."). That is the oldest one I have at the present time, and then this (referring to "Defendant's Exhibit, Labatory batch, sample No. 2, T. R. P.") is just one of the recent batches.

Q. 34. You have said you make no effort to standardize the color of the cocoa in making Quin-Coco. Will you now state whether or not you made any effort to standardize the color of the final Quin-Coco product in each batch?

A. I do not.

Mr. Rawle: The bottles produced are offered in evidence and marked "Defendant's Exhibit, Laboratory batch, samples Nos. 1 and 2 respectively."

464 By Mr. Rawle:

Q. 35. Will you state whether or not there are variations in color between different batches?

A. There are.

Mr. Rawle: Direct-examination closed.

Cross-examination (without waiving objections).

By Mr. Bradford:

X Q. 36. Where has the bottle marked "2-5-14" been since the date indicated thereon?

A. I have a small vault up there where I keep my samples. There are shelves with a collection of samples of different preparations that we make.

X Q. 37. Where has this identical bottle been since February 5, 1914?

A. 639 North Broad Street, Philadelphia, Pa., sixth floor.

X Q. 38. In what particular place?

A. I call it the vault.

X Q. 39. It was placed there by you on the 5th day of February, 1914?

A. The batch was made on that day. Probably it was on my desk for a day or two, but it went into the vault along with the other samples.

X Q. 40. And has been there ever since?

A. Yes, sir.

X Q. 41. Until today?

A. Until yesterday.

X Q. 42. How did you happen to discover this sample?

A. A question was asked in regard to the color, whether I follow, at least match each batch, and I said I did not. Then I was ordered to get my oldest sample and the recent sample, and I found that the colors were different. In fact, right along the colors are different.

X Q. 43. Why did you try to match the color of the St. Louis product originally?

465 A. Because both houses wish to make their preparations identical.

X Q. 44. Is it not true that following the same formula you will get the products substantially identical?

A. Providing you would have the same color of chocolate or cocoa, as we call it, then you would get it, but if the chocolate varies in color, you will not get it.

X Q. 45. How widely do chocolates vary in color?

A. Well, you might say from a light brown to a real dark brown. I have several samples of chocolate, and I have had about four different colors of chocolate.

X Q. 46. Some of them nearly black?

A. Well, never black. Never black; no, sir. Dark brown.

X Q. 47. This chocolate, I presume, is furnished to you by the purchasing department of your concern?

A. It comes from the purchaser; yes, sir.

X Q. 48. And received by you in its original form?

A. Yes, sir.

X Q. 49. In barrel lots?

A. In barrel lots.

X Q. 50. About how many barrels of chocolate do you use each month?

A. Oh, a barrel lasts me sometimes two months, and it has lasted me three months.

X Q. 51. You say your card shows that you made the first batch in March, 1909?

A. Yes, sir.

X Q. 52. Have you the card with you?

A. No, sir. I have not the card with me.

X Q. 53. Can you state from memory what this card shows?

A. Our card shows the month, the date and the year, then the number of the batch. On the reverse side, when finished, the amount made, and made by, and inspected by, and the date.

466 X Q. 54. What is the amount made, as shown by the card in March, 1909?

A. Thirty-eight gallons. A thirty-eight gallon formula my card is.

X Q. 55. This was your first commercial batch?

A. The first batch made.

X Q. 56. This batch was sold commercially, I presume?

A. Yes, bottled and sent out.

X Q. 57. You had made experiments prior to that time?

A. I had made no experiments with Quin-Coco.

X Q. 58. Had you made any experiments with the chocolate-quinine preparation?

A. I tried to make a tasteless syrup of chocolate-quinine.

X Q. 59. Using quinine sulphate?

A. Using quinine sulphate.

X Q. 60. And chocolate syrup?

A. And chocolate syrup.

X Q. 61. In imitation of what product?

A. In William R. Warner's time our salesmen came to my department on several occasions, and wanted to know if I could make a tasteless chocolate-quinine preparation. I told them I never made any, but I could try. I tried experiments, but without result.

X Q. 62. Did they refer to any such preparation that was then on the market when making this suggestion to you?

A. They did.

X Q. 63. What?

A. Coco-Quinine, Lilly.

X Q. 64. Did you have sample bottles or original bottles of Coco-Quinine, Lilly?

A. The manager in the office sent me a bottle of the Lilly preparation.

X Q. 65. Were any of these experiments conducted during 1908?

467 A. In the early part of 1908 I experimented, and also in 1907.

X Q. 66. Were there no experiments made while Mr. Groves was in the laboratory with you?

A. Mr. Groves saw me make experiments in the early part of 1908 and 1907.

X Q. 67. How do you know that you did not make any experiments during the latter part of 1908?

A. Because I was so busy on other preparations that I did not bother. I also knew at the time that there was a preparation similar to what I was trying to experiment with. Therefore, I did not bother with it.

X Q. 68. Is it not possible that you might be mistaken, and that some of these experiments ran into the fall of 1908?

A. No, sir.

X Q. 69. As stated by Mr. Groves?

A. No, sir, positively.

X Q. 70. Have you any written record of these experiments?

A. I have not, no.

X Q. 71. You depend wholly on your memory?

A. I do, yes, sir.

X Q. 72. Do you remember of comparing any other experiments with the original Lilly product that was in your laboratory, in Mr. Groves' presence?

A. In Mr. Groves' presence, yes, sir.

X Q. 73. And asking his opinion?

A. Asking him to taste it, but I was not successful.

X Q. 74. What did you explain to him was the reason of your failure?

A. There was no explanation made. It simply was not a success, and I did not bother with it. Dropped it.

X Q. 75. Who told you about the St. Louis formula first?

A. The St. Louis formula was sent to me by Mr. Pfeiffer in the early part, I would say, probably, of February, of the year 1909.

468 X Q. 76. How do you fix this date?

A. On account of my card making my first batch.

X Q. 77. What relation has the receipt of the formula to the time you made the first batch?

A. I received the formula about the month of February.

X Q. 78. Could it have been possible that you received the formula in December?

A. No, sir.

X Q. 79. Why couldn't it?

A. Because I got a cabinet, and the cabinet was not delivered to

me until the first of the year, January, and then one after another the cards, as I made the preparations, were delivered to my department.

X Q. 80. How do you know that the cabinet was not received in December?

A. I did not receive it. I received a cabinet in the month of January. It was really, as I considered it, a Christmas present. That is the reason I know it was the first of the year.

X Q. 81. Christmas of 1908?

A. I told the boy, I said, "I have got a Christmas present of a cabinet." That is the reason the time was clear in my mind. It was after the first of the year.

X Q. 82. The cabinet was to keep your formulas in?

A. That is what it is, yes sir.

X Q. 83. And the formulas from St. Louis were present at the time?

A. They were in the office, in the vault in the office, on the first floor.

X Q. 84. And were then transferred by you to the cabinet?

A. Then, as I made preparations, the formulas were sent from the office to my department, and it was recorded, and the date placed on the card in the cabinet.

X Q. 85. What time in 1908 was your last experiment that Mr. Groves saw in your laboratories of this product?

469 A. That I could not tell. I know it was early in the year.

X Q. 86. From whom did you receive your first instructions to make this product?

A. Mr. Garvin, of St. Louis.

X Q. 87. Personally, or by mail?

A. Personally.

X Q. 88. Did you visit St. Louis?

A. No, sir.

X Q. 89. Did Mr. Garvin visit you in Philadelphia?

A. Yes, sir.

X Q. 90. What did Mr. Garvin say to you about the product?

A. Simply, he gave me instructions, how he made the product, how he put it together, how he compounded it.

X Q. 91. What did he say about "Coco-Quinine"?

A. I do not believe the word "Coco-Quinine" was mentioned.

X Q. 92. What product was usually discussed by your traveling men and others when the subject of a chocolate quinine preparation was up for discussion?

Mr. Rawle: Objected to as irrelevant and not affecting the rights of the defendant.

A. As a rule, I never took the subject up with the traveling men. They just simply said, "We have got a dandy preparation on the market." There were really no particular names mentioned.

X Q. 93. Just a dandy preparation?

(Objected to as irrelevant and not affecting the rights of the defendant)

A. That is what they said when they came up. They brought the matter up. They said, "We have got a dandy preparation." I said, "Yes, we have."

X Q. 94. Did any of them ever say to you that the Lilly preparation "Coco-Quinine" was a dandy preparation?

(Objected to as irrelevant, and not affecting the rights of the defendant.)

470 A. Not to my knowledge, no, sir.

X Q. 95. Wasn't the fact that the Lilly preparation of "Coco-Quinine" was having a good sale one of the reasons advanced by your traveling men for getting a like preparation?

(Objected to as irrelevant, and not affecting the rights of the defendant.)

A. Not to me, because I did not come in contact with the traveling men so much.

X Q. 96. Did Mr Garvin tell you about his experience in producing this product in St Louis?

A. No, sir.

X Q. 97. Did he tell you where he got his formula?

A. No, sir.

X Q. 98. Did he tell you what experience the St. Louis house was having with it?

A. No, sir.

X Q. 99. What size batches of "Quin-Coco" do you make at the present time?

A. Thirty-eight gallons.

X Q. 100. Each lot a thirty-eight gallon lot?

A Each lot is thirty-eight gallons.

X Q. 101. How often do you make a thirty-eight gallon lot?

A. That varies. Sometimes twice a month. Sometimes in the winter time three times. It varies.

X Q. 102. You are speaking now of the Philadelphia laboratories?

A. Yes, sir.

X Q. 103. The product is still manufactured in the St. Louis laboratories, too?

A. To my knowledge, yes, sir.

X Q. 104. Did you ever compare your product with the Lilly product?

A. No, sir.

X Q. 105. Never held one sample of your product alongside of a sample of the Lilly product?

471 A. I have not got a bottle of the Lilly product in my department.

X Q. 106. Do you consider the two products very much alike?

A. I cannot say, because I have not seen Lilly's Coco-Quinine for I guess more than a year. Oh, more than a year. Clear back to

the time when I was experimenting. In fact, I dropped it then, having no more interest in it. I dropped it, and really up to the present time have not seen the Lilly sample.

X Q. 107. You did not think it was necessary?

A. No, sir, I did not.

X Q. 108. Do you remember saying to Mr. Groves you found after the formulas came from St. Louis that the chocolate you had previously used was not the same as called for by the formulas?

A. No, sir. He was not with me.

X Q. 109. You depend wholly upon your memory for your statement of this fact, do you?

A. Positively.

Mr. Bradford: Cross-examination closed.

Redirect examination, without waiving objections.

By Mr. Rawle:

R. D. Q. 110. Have you a clear recollection of the year when the Messrs. Pfeiffer first came to Philadelphia and took charge of the Warner business?

A. August, 1908.

R. D. Q. 111. How long before August, 1908, had you given up those experiments with a chocolate quinine preparation?

A. It was the early part of 1908. I am positive of that, because I went away on a little vacation, and I know there were no experiments made after that.

R. D. Q. 112. Where did you go on a vacation?

A. Atlantic City.

R. D. Q. 113. You have testified in substance that after the 472 Pfeiffers came here there was an existing chocolate *qi*unine preparation and you did not bother about it. What preparation was that?

A. Quin-Coco.

R. D. Q. 114. Who was making it then?

A. The St. Louis house.

R. D. Q. 115. In whose name, I mean?

A. Searle & Hereth.

R. D. Q. 16. This vault you have spoken about, is that on the same floor with your laboratory?

A. Yes, sir.

R. D. Q. 117. Locked up?

A. Yes, sir.

R. D. —. 118. Do you keep the key?

A. I do.

R. D. Q. 119. When you turn out a batch of Quin-Coco these days, do you make any attempt to standardize it or compare it with the Quin-Coco made at St. Louis?

A. No, sir.

R. D. Q. 120. When did you cease to do that?

A. After we made the first or second batch. There is my vault key, also my dressing room key (producing key).

Recross-examination.

By Mr. Bradford:

R. X Q. 121. You found that the first and second batch compared well with the St. Louis samples, did you?

A. Yes, sir.

R. X Q. 122. Therefore, you thought it was not necessary to make any further comparison?

A. No, sir.

R. X Q. 123. Did anyone ever tell you that the St. Louis product was a pretty close imitation of the Lilly product?

Mr. Rawle: Objected to as irrelevant, immaterial and incompetent and as calling for hearsay, and as altogether improper.

473 A. No, they did not.

R. X Q. 124. What did you think of it yourself?

A. The Quin-Coco as a preparation?

R. X Q. 125. Yes.

A. Very good.

R. X Q. 126. As an imitation of the Lilly product, what did you think of it, from your knowledge of the Lilly product previously made?

A. Ours was superior.

R. X Q. 127. How did you regard it in point of being practically the same thing?

A. We did not compare it in regard to being the same thing at all.

R. X Q. 128. You did not give that phase of the question any consideration?

A. No.

R. X Q. 129. What was the first liquid quinine sulphate preparation which you knew of on the market?

Mr. Rawle: Objected to as irrelevant, immaterial and incompetent, and as calling for hearsay, and as altogether improper.

A. I could not say. I knew of such a preparation as the Lilly, but I did not interest myself very much in it because I never had any occasion to make any. That is really the reason why.

R. X Q. 130. You were chiefly interested in the manufacturing department?

A. Yes, that is my work.

R. X Q. 131. And did not come in contact with the trade?

A. No, sir.

R. X Q. 132. Or know much of the demands?

A. I did not.

R. X Q. 133. You spoke of hearing of an existing chocolate

quinine preparation and the name was Quin-Coco. Didn't you know of Coco-Quinine before you ever heard of Quin-Coco?
474 A. I never heard of Quin-Coco prior to the time that the Pfeiffer Chemical Company came with us.
R. X Q. 134. But you had heard of Coco-Quinine Lilly?
A. I had a sample which I told you I was trying to imitate for William R. Warner & Company.

Deposition closed.

HARRY FRITSCH.

At 4:20 P. M. the hearing was adjourned until Thursday, December 30, 1915, at 10 o'clock A. M.

Thursday, December 30, 1915—10 o'clock a. m.

Present: Parties as before noted.

GEORGE M. BERINGER, a witness called on behalf of the defendant, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. What is your name, age, residence and occupation?
A. My name is George M. Beringer; age fifty-five; residence, 414 North 5th Street, Camden, New Jersey; occupation, Pharmacist and Chemist.
Q. 2. Please state when you originally went into the drug business, giving the consecutive history of your connection therewith.
A. I engaged in the drug business in 1876, and have been in it ever since. I graduated from the Philadelphia College of Pharmacy in 1880, and have been working in pharmaceutical and chemical matters ever since. I first went with the Philadelphia firm of Bullock & Crenshaw, wholesale druggists, 528 Arch
475 Street, in the wholesale manufacturing of pharmaceutical lines and chemical lines, in 1876, and I was with them until the 1st of June, 1892.
Q. 3. Then what?
A. Then I purchased my present business in Camden, New Jersey, and located there, and I have been there ever since 1892.
Q. 4. Carrying on the retail business?
A. Retail and manufacturing and physicians' supply business.
Q. 5. Will you state your connection with the Pharmaceutical College here? What is your connection with it, and how long has it been?
A. I am Trustee and Chairman of the Board of Trustees, and Chairman of the Committee on Instruction of the Philadelphia College of Pharmacy of Philadelphia at the present time.
Q. 6. And how long has that been?
A. Became a trustee in 1893 and I have been chairman of this committee of the trustees for about thirteen or fourteen years. Maybe fifteen years.

Q. 7. Chairman of the Board for how long?

A. Chairman of the Board since Mr. Kline's decease, about four years ago.

Q. 8. Have you ever taught there?

A. I taught for two seasons.

Q. 9. Will you take up the pharmaceuti-al associations which led up to the National Formulary and that sort of thing, and how long you have been connected with committees there?

A. I have been active in the work of the American Pharmaceutical Association since 1902, when they celebrated their semi-centennial in Philadelphia. In 1902 they got me actively in the work, and I have not gotten out of the harness yet.

Q. 10. State what work you have done on committees?

A. I have been chairman of the Section on Practical
476 Pharmacy and Dispensing. I was on the Committee of the Association on the United States Pharmacopœia for a number of years. I am a member of the Committee of Revision of the National Formulary that is now revising the book. I am chairman of the Committee on Unofficial Standards, which is preparing the standards for the crude drugs and cheimcals to go into the revision. I was president of the Association for one year.

Q. 11. What year?

A. The year 1913-1914. I am likewise a member of the Committee of Revision of the United States Pharmacopœia.

Q. 12. Have you read in the plaintiff's record in this case the testimony of E. G. Eberhardt?

A. I have.

Q. 13. Mr. Eberhardt, when called as a witness for the plaintiff in this case (Plaintiff's record, page 22) testified that he was a chemist in the employ of the plaintiff. He also testified (Plaintiff's record, page 23) in answer to Q. 3, in substance that "The first attempts" that were made in the Lilly laboratories "were the mere mixture of quinine sulphate with syrup and with yerba-santa as a disguisant for the bitterness," and that "later the idea of adding chocolate" came to him as a means of giving a distinctive color and a characteristic appearance, and, furthermore, to keep in better suspension the material in the preparation."

State what you have to say in regard to this evidence, giving your reasons for any statements that you may make?

A. Yerba-Santa alone does not hold the quinine in suspension. There is always more or less precipitation of quinine separating out. The chocolate combines with the yerba-santa adding to its blend and acceptability as a flavor and disguise, and it likewise gives the preparation *what* is lacking in the yerba-santa alone, the power of suspending or distributing the quinine throughout the liquid prepa-
477 ration. So that in my opinion the chocolate in this formula would serve a dual purpose, that of adding to the flavor and blending the flavor of Yerba-Santa, and likewise supplying a property which is lacking in yerba-santa, of holding the quinine in suspension and distribution throughout the syrup.

Q. 14. Will you state what extent in your opinion the use of choco-

ate is essential in this chocolate quinine preparation to a saisfactory reparation, which can be successfully marketed as a bitterless liquid reparation of quinine?

A. In my opinion the chocolate plays a very important function n the preparation. It is certainly essential to a palatable and satfactory preparation of quinine for a liquid preparation to be successfully marketed.

Q. 15. Mr. Eberhardt appears to testify that in his opinion the hocolate would only be effective as giving a distinctive color and n elegant flavor to such a preparation. What is your opinion on his subject?

A. The chocolate undoubtedly adds to the flavor, and by the flavor" I mean in that case the taste, because it would add practically nothing to the odor. So that the function of flavor, as I nderstand it, in this case would be the sense of taste to the organs. The chocolate undoubtedly there blends with the yerba-santa, and he small amount of vanilla, which is present, making a very aceptable flavor, and one that would be appreciated by the takers of uinine in liquid form.

Q. 16. What do you understand to be the idea contained in the ord "flavor" in this connection?

A. The word "flavor" to my mind there conveys the thought hat it adds something which is pleasant to the sense of taste or to he zest of appreciation of a preparation. In other words, it increases ts pleasantness and palatability.

Q. 17. Mr. Eberhardt, in his answer to X Q. 31, testifies as follows P. R. 30):

78 "A. The chocolate plays no part in disguising the bitterness but it does aid, to some extent, in holding the quinine n suspension, as any other thickening agent would do."

What have you to say as to this, giving your opinion for any statement you may make?

A. I cannot agree with the statement that it plays no part in disuising the bitterness. In my opinion it plays, in this respect, a mewhat minor but still an important factor in blending with the erba-santa and improving the palatability of the preparation. Rearding its suspending value, it supplies a very needed property, hich is lacking in the yerba-santa, and I do not know of any other ibstance that combines in just the way that chocolate does its susending power for quinine and similar chemical drugs.

Q. 18. By reason of what qualities in chocolate is it a successful gent in respect to its power of suspending the quinine sulphate?

A. That, in my opinion, is due to the combination of its ingredits. There is a certain amount of starch and altered starch. There a certain amount of fat, which aids in the suspension and emulnizing, and a certain amount of mucilaginous like substance, all which aid in chocolate and cocoa the peculiar suspending emulnizing power that they possess.

Q. 19. Will you state, then, to what extent, in your opinion, both

yerba-santa and the chocolate in this preparation are essential in order to have a proper combination of ingredients to produce a stable and satisfactory bitterless preparation of chocolate quinine in liquid form?

A. In my opinion both of these materials are essential to a successful formula that will produce a stable satisfactory and marketable preparation.

Q. 20. Mr. J. K. Lilly, of the plaintiff company, testified on page 81 in answer to Q. 17 that the presence of cocoa in the plain-
479 tiff's preparation Coco-Quinine is not essential to its palatability or quinine disguising power. "Its presence is not essential to its palatability or quinine disguising power." Please state what your opinion is as to that statecmnt, giving your reason for your opinion?

A. In my opinion the cocoa present is essential to the disguising power and palatability of the preparation.

Q. 21. Have you ever tasted either Lilly's Coco-Quinine or Quin-Coco made by Searle & Hereth?

A. Yes, sir, I have tasted both.

Q. 22. Will you state what the predominating taste of either of those two preparations is?

A. The predominating taste is rather difficult to determine, which one is the most prominent. The first taste you get, at least the impression that I received, was that of chocolate, and then the peculiar cloying semi-resinous flavor of the aromatic yerba-santa came out, and then there seemed to be a blending of the two, a harmony of the two flavors, and I could detect along with that a little vanilla flavor.

Q. 23. John M. Francis, a witness called for the plaintiff, who said he was chemical superintendent of Parke-Davis & Company of Detroit, stated (Plaintiff's record page 100) in answer to Q. 4, that "The utility of chocolate or cocoa in such a preparation would be that it serves the purpose of imparting to such a preparation a distinctive flavor and a distinctive color." Please state what your opinion is as to that testimony, and give your reason for your opinion?

A. The statement appears to me to be only partially so. The chocolate undoubtedly adds to the color and likewise to the flavor, but it serves to my mind an equally or even more so important function of giving a body or suspending value in the preparation, which is one of the essential functions of a preparation to
480 be dispensed. Unless the quinine is distributed through and suspended in such a way that it will not settle to the bottom, the dispenser could not administer it in a dose that was at all representative of the active constituent quinine nor of the intent of the prescriber. In other words, the dose would be very uncertain. The bulk of the quinine would be at the bottom of the container.

Q. 24. John M. Francis also testified (P. R. 101):

"X Q. 9. Is the quinine dissolved?

A. My belief based upon similar syrups made under my own supervision is that the quinine is in solution."

Please state what your opinion is as to that testimony?

A. Dr. Francis is undoubtedly mistaken, as the bulk of the quinine is in suspension and not in solution.

Q. 25. Can you state whether or not the fact you have stated that the quinine sulphate is in suspension and not in solution is shown by the microscope?

A. Under the miscroscope both of these syrups of quinine with chocolate show the quinine sulphate crystals distributed throughout the syrup and practically the same shape and size, showing that they are simply in suspension and the salt is not there in a solution.

Q. 26. For the benefit of the lay mind, will you state what you mean by the term "salt"?

A. I use it in connection with quinine sulphate as a salt. A salt is a union of some organic or metallic base with an acid to make a distinct chemical combination.

Q. 27. Will you state whether or not if quinine sulphate were in solution in any preparation it would increase the bitterness of the quinine sulphate?

A. I have experimented along that line, and I am fully convinced that any attempt to put the quinine in solution would increase the bitterness of it.

Q. 28. Dr. John M. Francis (Plaintiff's record page 100) testified as follows:

481 "Q. 5. Might or might not other syrups or other colors and other flavors be used in the product without changing its medicinal properties or characteristice?

A. Yes, sir."

Please assume that Dr. Francis in this testimony is referring to chocolate quinine preparations of the kind here involved, and state what your opinion is as to the statement he gave in the words quoted.

A. In answer to query 5, doubtless the medicinal properties would not be altered, but the characteristics of the physical properties would be materially altered by the character of the syrup or flavor added. My own experiments show that all the articles that have been recommended, to my knowledge, for this purpose, do not have the necessary qualifications, either the quinine is put in solution, and the bitterness brought out, or the quinine is not kept in suspension, or the flavoring is not adequate. So that all the various combinations that have been recommended for this purpose, outside of chocolate and Yerba-Santa, have been unsatisfactory.

Q. 29. Will you state whether or not you have experimented on these lines to any extent, and for how long?

A. I have experimented considerably on these lines both because of my own business interests, and likewise because the subject is referred to a sub-committee of the National Formulary, of which I happen to be the Chairman, and necessarily considerable experimentation fell to my lot.

Q. 30. You mean the subject of chocolate quinine liquid preparations?

A. Yes, sir, quinine chocolate liquid preparations.

Q. 31. Have you made up and will you produce mixtures of quinine sulphate with various other vehicles or syrups?

482 A. I have made a number of these experiments with the vehicles that have been proposed for the purpose of disguising quinine when administered in liquid form.

There we have plain syrup. You will notice that the quinine settles almost entirely to the bottom (referring to Defendant's Exhibit, Beringer sample, No. 1).

Here we have a syrup of ginger. You note here the suspension is somewhat better. The ginger content seems to aid in suspension. (Referring to Defendant's Exhibit, Beringer sample, No. 2.)

This one is a syrup of tolu, the same proportion of quinine in each case. There, like the plain syrup of sugar, it is practically entirely precipitated. The quinine is practically entirely precipitated (referring to Defendant's Exhibit, Beringer sample, No. 3.)

This one is with a syrup of orange peel. The suspension there is somewhat better of the quinine than it is with the plain syrup (referring to Defendant's Exhibit, Beringer sample, No. 4).

This one is a syrup of vanilla. Vanilla syrup. Here you have again the quinine practically all precipitated out (referring to Defendant's Exhibit, Beringer sample, No. 5).

This one is with a syrup of wild cherry. The bulk of the quinine is again precipitated out (referring to Defendant's Exhibit, Beringer sample, No. 6).

This one is with a syrup colored with caramel. The addition of caramel seems to aid a little, but not much, in keeping the quinine from precipitation. It is still nearly all precipitated (referring to Defendant's Exhibit, Beringer sample, No. 7).

This is a syrup of coffee. Here we have the quinine precipitated out, showing evidently that there is tannin present in the coffee by the character of precipitate. It goes out, not in the same way the precipitate is in the plain syrups, and other syrups, but as a fine

483 colored precipitate, which indicates evidently some tannin present. (Referring to Defendant's Exhibit, Beringer sample, No. 8.)

Here we have a syrup of licorice. Again, the quinine is separated out. These have been made for about two weeks. The quinine is separated out in a dense sediment, adhering closely to the bottom of the bottle (referring to Defendant's Exhibit, Beringer sample, No. 9).

This is a syrup of yerba-santa. Here it is apparent that the yerba-santa constituent has united with the quinine. There you have your precipitate at the bottom, again in more or less a dense form (referring to Defendant's Exhibit, Beringer sample, No. 10).

This is a compound of elixir of taraxacum, a compound of elixir of dandelion, which has been very much recommended as a vehicle for quinine, as a disguise for quinine. The result, as you see there, is that the quinine is very largely precipitated. There again I imagine the precipitation is due to the tannin from the constituents present in the elixir, wild cherry and other ingredients, dandelion, and so forth. (Referring to Defendant's Exhibit, Beringer sample, No. 11.)

These eleven samples were made by me about two weeks ago.

Q. 32. Will you state whether or no in your opinion and from your experience any of the eleven samples that you have produced marked from one to eleven constitute a satisfactory and marketable pharmaceutical preparation?

A. Not one of them.

Mr. Rawle: The eleven bottles, produced by the witness, marked "Defendant's Exhibits, Beringer samples, Nos. 1 to 11," respectively, are offered in evidence.

By Mr. Rawle:

Q. 33. Will you state whether or not in your opinion there is any ingredient that you could add to each or any of these eleven
484 samples which would improve its value or quality in the respect in which it is now deficient?

A. I do not know of any ingredient that could be added that would make them satisfactory.

Q. 34. Do you know of any ingredient which would be practical?

A. I do not know of anything which would be practicable to add.

Q. 35. I wish to add to both this and the last question "excepting cocoa." I have asked the last two questions with the reservation in my mind, though not expressed, of adding chocolate or cocoa. Will you state whether or not you had that exception in your mind in answering those two questions?

A. I had in my mind that cocoa or chocolate was not included in the query.

Q. 36. Please produce samples of Coco-Quinine, Lilly, and Quin-Coco, Searle & Hereth.

A. I produce two bottles so labelled.

Mr. Rawle: They are offered in evidence and marked "Defendant's Exhibits, Beringer samples, Nos. 12 and 13," respectively.

By Mr. Rawle:

Q. 37. State whether or not in your work and your reading you have come across references to the use of chocolate or cocoa as a vehicle for the administration of drugs, and especially of quinine sulphate?

A. Yes, I have come across several references where chocolate is recommended as a disguise for disagreeable drugs and especially cinchona preparations.

Q. 38. Recite whatever you find.

A. As long ago as 1879 the National Dispensatory stated:

"Chocolate also forms the basis for exhibiting iron and other medicinal substances, and has been proposed as a pleasant vehicle in the preparation of lozenges containing santonin, &c."

485 Chocolate is now recognized as of sufficient importance as a vehicle in pharmaceutical work to be standardized in the

Swiss, Austrian and Swedish pharmacopœias and the British Pharmaceutical Codex contains a description of chocolate under the name of Pasta Theobromatis, and in the National Formulary, which is now in press, we will standardize cacao for pharmaceutical purposes in this country.

In the Druggists' Circular for 1871 appears a formula from a French authority, Dr. Heuze, for preparing an extract of Peruvian bark with chocolate as a disguise. This is at page 27, 1871, January. This is probably one of the earliest, if not the earliest, published suggestion for combining the distinctive flavor of chocolate with quinine, and the title proposed was "Quinine Chocolate."

In Hager's Hand Book, which I have here, "Pharmaceutischen Praxis," there are several formulas given,

One for Pasta Cacao cum Extracto Chinae with a German title of China-Chololade. In this 485 parts out of 1,000 is chocolate.

In the same volume is a formula for Pasta Cacao cum China containing nearly fifty per cent of chocolate.

Also in this book is a formula for Vinum Chinae cum Cacao, being a formula suggested by the French authority, Bugeaud. This formula contains one hundred parts of cacao in two thousand of the product.

This book, from which I have just quoted, bears the imprint on the title page of "Berlin, 1900," and the preface is dated at Berlin, January, 1899.

Q. 39. The formulas you have just read from the German work mention Peruvian bark and cinchona. Will you please state what these names indicate and what relation they bear to quinine sulphate?

A. Cinchona bark is the source from which quinine sulphate is prepared.

486 Q. 40. Peruvian bark?

A. Peruvian bark is the bark of the cinchona. Originally the supplies of cinchona were obtained from South America, largely from Peru; hence the name Peruvian bark was attached to cinchona. Today our sources of supply are largely Ceylon and Java and East India cultivations.

Q. 41. State whether or not you remember during your association with Bullock & Crenshaw in Philadelphia in your early days a quinine chocolate preparation then on the market?

A. We used to sell in quite considerable quantities quinine chocolate lozenges or tablets made by Caswell & Company in New York. In the decade between 1880 and 1890, these were very popular with our customers.

Mr. Bradford: Objected to as immaterial and irrelevant.

By Mr. Rawle:

Q. 42. How were these tablets labelled?

(Objected to as immaterial and irrelevant.)

A. Labelled Quinine Chocolates.
Q. 43. Will you state what the National Formulary is?

(Objected to as immaterial and irrelevant.)

A. The National Formulary is a book of standard formulas that has been prepared and issued by the American Pharmaceutical Association. The American Pharmaceutical Association membership is made up of pharmacists, both wholesale and retail, chemists, teachers, editors and writers, and those engaged in pharmaceutical establishments. Anyone that is at all associated with pharmaceutical work is eligible to membership.
Q. 44. It meets when?

(Objected to as immaterial and irrelevant.)

A. It meets annually in convention, and then the work in
487 the interim is carried on by an executive council that manages the business of the Association and the various committees that carry on the scientific research and publication work and so on of the Association.
Q. 45. How many such committees are there approximately?

(Objected to as immaterial and irrelevant.)

A. Probably a dozen standing committees that carry on the work.
Q. 46. And the Executive Committee consists of what?

(Objected to as immaterial and irrelevant.)

A. The Executive Committee or the council consists of officers of the Association, the editor, the secretary of the council, the reporter on the progress of pharmacy, the chairmen of the different sections, which are really branches or committees of the Association, and the delegates selected from each local section. For instance, here in Philadelphia we have the Philadelphia branch. In New York we have the New York branch. In Indianapolis I think they have a branch. In Detroit they have one. This constitutes the executive council along with three members elected each year for a term of three years. So that there are three members at large elected in addition to the officers.
Q. 47. Will you state whether or not you publish from time to time a volume giving the accepted drug formulas?

(Objected to as immaterial and irrelevant.)

A. You are referring to the National Formulary?
Q. 48. Yes, that is what I mean.

(Objected to as immaterial and irrelevant.)

A. The National Formulary has, up to date, been revised at irregular periods. Whenever in the judgment of the Associa-
488 tion a revision was called for, it would be prepared and published. There have been three editions of the book pub-

lished since, the first in 1887, and the fourth edition, which will be the third revision, is now in press.

Q. 49. Upon what theory do formulas find their way into this National Formulary? That is, what is its scope and fundamental idea?

(Objected to as immaterial and irrelevant.)

A. The idea that led to the issuing of the National Formulary was the purpose of supplying standard formulas for these preparations which were prescribed by physicians, so that no matter in what part of the United States these prescriptions were compounded they would be uniform. In the absence of an official formula for some elixir, we will say, the druggist would be at liberty to compound a prescription calling for such an elixir with any strength or any color or any flavor, and it was to eliminate that evil and source of continual criticism that the National Formulary was prepared and published.

Q. 50. What considerations as to a given drug or preparation is the basis of entry into the National Formulary?

(Objected to as immaterial and irrelevant.)

A. The basis of decision as to the admission into the National Formulary has been the use of the preparation, whether it was sufficiently used either in one location, or in a number of locations to require the preparation of a definite standard formula.

Q. 51. By what machinery of the Association is a decision reached on the admission of any particular drug or preparation to the National Formulary?

(Objected to as immaterial and irrelevant.)

A. Recommendations come to the Committee of Revision of the book from different pharmaceutical associations, from the
489 membership of the Association at large, from the membership of its own committee, and these suggestions are all collected and sifted out, and then a vote is taken among the members of the committee as to the admission or non-admission of the proposed title. If the committee votes in favor of including the title, then it is referred to one of the sub-committees, depending on the character of the preparation, whether it is a syrup or a tincture or a fluid extract or a solid extract, and so on, and it then becomes the duty of the sub-committee to investigate the subject, and, if possible, to prepare a satisfactory formula, and report back the same to the General Committee of Revision of the National Formulary. If the committee then approves of the formula, it is accepted and enters into the publication.

Q. 52. State whether or not the National Formulary is a work of accepted authority in the drug business and among the physicians and whether or not it is a recognized legal authority by the United States Government.

(Objected to as immaterial and irrelevant.)

A. The National Formulary has been accepted by the pharmacists of the country as a book of standard formulas. It has been accepted by very many physicians, who now prescribe its formulas, and it has been adopted as one of the legal standards for medicines by the National Food and Drugs Act of June 30, 1906, and by many acts of the different states since that time.

Q. 53. Please cover substantially the same ground in regard to the United States Pharmacopœia.

(Objected to as immaterial and irrelevant.)

Q. 54. Who makes it up and publishes it and what is its authority?

(Objected to as immaterial and irrelevant.)

A. The United States Pharmacopœia is a standard for medicines. All civilized nations have prepared a pharmacopœia covering
490 the principal medicines used in that country. The United States Pharmacopœia is prepared by a committee of revision which is selected at the Decennial Convention held in Washington. These conventions were held in the even decennial years since 1820. 1910 was the last. The delegates to the convention are composed of delegates from the incorporated medical and pharmaceutical societies, the chemical societies, the various departments of the Government, such as the Marine Hospital Service, and the Department of Agriculture and likewise the Dental Society. The National Dental Society was recognized at the last convention. The convention selects the committee to whom it entrusted the work of revising the book. It likewise elects the trustees who have to do with the business management of the publication and of the convention as an organization. The Committee on Revision that is now at work was composed of fifty members, with the president of the convention, Dr. Wiley, ex-officio. So that it really has now fifty-one members. This committee has been sub-divided into fifteen sub-committees, and the chairmen of these sub-committees, along with the chairman of the general committee, and Dr. Wiley, as president of the convention, constitute the Executive Committee, whose duty it is to pass upon the principal questions and especially to see that the copy is prepared and properly edited and published. The meetings are held decennially, and the book is published as soon after the decennial convention as the revision can be completed.

Q. 55. State what authority this work has?

(Objected to as immaterial and incompetent.)

A. It is now the recognized legal authority of the United States, governing standards of the drugs and medicines, which it describes and defines in inter-state commerce, and in very many of the states it has been made the legal authority so as to cover intra-state dealings in these medicines. The Pharmacopœia is recognized by the
491 Food and Drugs Act of June 30, 1906, as one of the legal authorities for fixing standards and test of identity and purity for drugs.

Q. 56. State whether or not you have served on revision committees who have had to do with the preparation of the National Formulary and of the United States Pharmacopœia, and if so in what capacity, and when?

A. I am a member of the Committee of Revision of the United States Pharmacopœia, chairman of the sub-committee on fluid extracts, solid extracts and tinctures, a member of the sub-committee on liquors and spirits and waters, a member of the sub-committee on elixirs and syrups, a member of the sub-committee on essential oils, volatile oils, and by virtue of being chairman of one committee, I am a member of the Executive Committee. In the National Formulary Revision I am a member of the Committee of Revision, I am chairman of one of its sub-committees, to which has been assigned many of the topics for investigation and report, and I am chairman of the Committee on Unofficial Standards that has prepared for this Committee of Revision standards for the drugs entering into the formulas for which the Pharmacopœia had not fixed standards.

Q. 57. Can you trace the history of preparations from their original production, then when they go into more or less general use, and finally find their way into the United States Pharmacopœia or the National Formulary?

A. As a matter of custom you mean?

Q. 58. Yes, as a matter of custom. What has generally taken place?

(Objected to as immaterial and irrelevant.)

A. The procedure usually is that an article is presented to the medical profession, either through an individual who has experimented on it and made a discovery, or thinks he has, or more
492 frequently through some pharmaceutical establishment or chemical establishment which has investigated and brought out a new chemical product or new pharmaceutical preparation, and proceeds to exploit it to the medical profession. If its use is one that appears to be satisfactory and becomes extensive and general, then it becomes of such importance, that either the Pharmacopœia or the National Formulary is called upon to prepare standards for the product or preparation, so that there will be uniformity throughout the country in its dispensing and use.

Q. 59. State whether or not when a preparation has been originally introduced and has found accepted or found a market, the usual history of such preparations is that they have been made and marketed by other manufacturers. What can you say about this?

(Objected to as immaterial and irrelevant.)

A. It has been, I think, the universal custom, that when a preparation, after marketing, has met with favor and becomes used to any extent, the manufacturers all make it, push its sale energetically, as long as it is a good seller, and help to make it popular.

Q. 60. If a given preparation has been originally marketed by one house, being then perhaps new, and subsequently followed a

marketing by say a dozen other houses, what have you to say as to the nature of standardizing such preparations when marketed by so many different manufacturers?

(Objected to as immaterial and irrelevant and incompetent.)

A. The committee have generally, when these questions have been presented to them, taken up the question as to the general or extensive use of the article, and then they have given consideration to its therapeutic value. If the article is one that they feel sure
493 had no basis for its medical claims, and was a fraud, as sometimes has happened, or was improperly exploited, they have been very careful to exclude it from the legal authorities, but if the preparation is one of merit and is generally used, then it was accepted as the duty and the responsibility of the Pharmacopœia or the National Formulary to prepare the legal standards for the article or preparation. There have come into the Pharmacopœia, in addition, I might explain, some items which, while not in themselves of therapeutic activity or use, were necessitated because of the use pharmaceutically in preparing some other preparation in the book, and were essential ingredients and had to be standardized so that uniformity in the final product would be assured, and that is what we call pharmaceutical necessity, necessitating the introduction of an article in the Pharmacopœia.

Q. 61. In tracing the beginnings of preparations, their growth in use, and their final admittance to the United States Pharmocopœia or the National Formulary, will you state whether or not you include preparations which are of the kind that are spoken of as "open formulas," as "proprietaries" and as "specialties"?

(Objected to as immaterial, irrelevant and incompetent.)

A. There has never been a question about the availability of open formulas for Pharmacopœia or Formulary purposes. Regarding the specialties, the various pharmacopœias have not hesitated, when the specialties were of merit and were generally used, to prepare standard formulas that simulated or took the place of unstandardized formulas. The history of many of the drugs that are now in the Pharmacopœia is in some respects very interesting. Among the older ones some were actually secret formulas. Some were patented articles. Yet their use was so extensive that they have come down, some of them for many years, into our present standard formularies
494 and pharmacopœias. Regarding "proprietaries," they were considered the same way as we considered what I referred to as specialties. I used the word "specialties" really with the idea of designating the articles that were not patented, which are commonly spoken of as specialties or proprietaries. The rule has been up to the present time that articles protected by patent were not standardized by the Pharmacopœia unless those patents have expired and the articles had become common property. Then they were admitted and standardized if they were of sufficient use or value to require it.

Q. 62. Can you produce a list of proprietary medicines or special-

ties which have been introduced by the original houses, have been extensively marketed, and have subsequently found their way into the United States Pharmacopœia?

(Objected to as immaterial, irrelevant and incompetent.)

A. There are quite a few items which have been specially advertised as proprietaries, and that have eventually found recognition under official titles in the pharmacopœias. For example, to illustrate what I mean, Anti Kamnia was exploited by a St. Louis firm as the name of a compounded powder. The Pharmacopœia has introduced a formula for a Compound Acetanlid Powder, containing caffeine acetanlide and sodium bi-carbnate, which we presume to be the same, essentially and therapeutically. Cataplasm Kaolin in the present Pharmacopœia is another good example. Antiphlogisti-n, popularly called Denver Mud, and other preparations were advertised, and used to such an extent by the physicians that it was deemed advisable to standardize a formula for antiphlogisti-n and similar compositions, and so the Pharmacopœia introduced Cataplasm Kaolin containing Kaolin clay or earth, glycerine, some aromatics of a phenolin character and boric acid.

495 Another example is seen in the Pharmacopœia recognition of Liquor Antisepticus. The exploitation of Listerine, successful, by the Lambert Pharmacal Company of St. Louis. That goes back at least twenty-five years. I cannot give the exact date. They made that type of formula very popular, and the Pharmacopœio introduced a standard formula for an antiseptic solution, so that the doctors could prescribe an official formula in place of a proprietary. I recall some noted examples.

For instance, Fowler's Solution of Arsenic is now not only in our Pharmacopœia, but in, I think, nearly all, if not every, Pharmacopœia that I have consulted, as Liquor Arsenicalis, Fowler. It was originally introduced as a secret remedy by an English druggist, who sold it as Fowler's Metallic Solution. It became a very popular remedy, and finally, when its formula became known, its use was such as to warrant recognition, and, as I stated, it is in all pharmacopœias, and the name "Fowler" is still attached to it.

Compound Powder of Rhubarb and Magnesia is in the Pharmacopœia. For it the common name of Gregory's Powder is still quite frequently used, because it originated with Dr. Gregory of Edinburgh.

Dover's Powder is even still a more noted example. Every Pharmacopœia still uses the name "Dover's Powder" in honor of Dr. Dover, who introduced it as a secret remedy at first, and afterwards it was published.

Those are some of the old formulas which are now present in our Pharmacopœia, and it is a matter of record and history that even such well known chemicals as sodium bi-carbonate and Rochelle salts were originally introduced as patented and proprietary articles, and were used for many years before they were introduced into the pharmacopœias.

Wine of Opium, commonly called Sydenham's Laudanum, was introduced by an English physician by the name of Sydenham, and for quite a time the formula was kept secret, and it is still spoken of as Sydenham's Laudanum. It is present in the Pharmacopœia as "Wine of Opium." The name "laudanum" itself comes down from Paracelsus, who, in some respects, is considered the father of pharmacy. He made a preparation which he called laudanum, in which opium was the principal medicine. It was a secret formula. Yet that name has been continued down for over three centuries, and is still accepted as the proper name for tincture of opium.

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Q. 63. You have given the names of a number of preparations which ultimately found their way into the Pharmacopœia or the Formulary. Will you now please state whether or not these had been introduced by a certain discoverer or doctor or drug house, and were subsequently, and before they found their way into the Pharmacopœia or Formulary, manufactured extensively, and marketed by other drug houses.

(Objected to as immaterial, irrelevant and incompetent.)

A. Very many of them have been, and were, manufactured by many houses, besides the originator. The most noted example of that, probably, is mineral oil. That is now recognized in the Pharmacopœia. It dates back to the investigations and patents issued to Robert A. Chesebrough of New York, who obtained a patent for a purified petroleum product, which he called vaseline, and then, in the course of a few years, he brought out a purified liquid paraffin which he recommended as liquid vaseline, for coughs, colds, and the treatment of tubercular conditions. Later, various petroleum oils were still more highly purified until we got them water-white, and practically odorless and tasteless, and then a few years ago the celebrated English physician, Sir W. Arbuthnot Lane, published a paper and lectured on the subject as well, on the value of mineral oil in the treatment of chronic constipation. While prior to that time few manufacturers had marketed this oil for medicinal use such as, for example, liquid albolene: since that time the use has been very rapidly growing, and I have here a list of I do not know how many different names, showing the different trade names under which purified liquid paraffin oil or mineral oil is on the market and sold by different houses, each name representing the output of a different house, the labelling of the different houses, probably the product from the same factory, with a dozen different names. The list follows:

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Adepsine Oil
Amilee
Atoleine
Atolin
Blandine
Calol
Crysmalin
Deeline
Glyco
Glycoline
Glymol
Heavy Petroleum Oil
Interol
Liquid Albolene
Liquid Cosmoline
Liquid Fossiline
Liquid Geoline
Liquid Paraffin
Liquid Petrolatum
Liquid Saxoline
Liquid Vaseline
Mineral Glycerine
Mineral Oil
Neutralol
Nujol
Olo
Paraffin Oil
Parolin
Petralol
Ptero
Petrolax
Petrolia
Petrolene
Petronol
Petroseol
Rock Oil
Russian Liquid Petrolatum
Russian Mineral Oil
Russian Paraffin Oil
Russol
Saxol
Terraline
Terralbolia
Usoline
Waterwhite-Mineral Oil
White Paraffin Oil

The United States Pharmacopœia has adopted the title of Petrolatum Liquidum for this preparation instead of taking the trade names vaseline, cosmoline, it took the coined name, Petrola-
498 tum, and for this liquid preparation, liquid paraffin oil, it has taken the name of Petrolatum Liquidum. The foreign pharmacopœias have generally adopted the name Paraffinum Liquidum.

Q. 64. Referring to this list of prepartions which you have just given in connection with mineral oil, will you please state whether the various preparations on your list, and the different brands thereof, are practically identical in taste, appearance and in therapeutic action?

A. They are practically identical.

Q. 65. Can you produce a list of proprietary preparations originally put out by a house or firm or person, which have found a market, and finally were put into the United States Pharmacopœia?

(Objected to as immaterial, incompetent and irrelevant.)

Q. 66. And follow this, if you can with a similar list relating to the National Formulary.

(Objected to as immaterial, incompetent and irrelevant.)

A. I have compiled a list of titles which have been introduced into the Pharmacopœia for preparations or chemical products which were formerly controlled either by patents or as proprietaries, and have likewise done the same thing regarding the formulas in the National Formulary.

For instance, Antifebrin was introduced by Kalle as a proprietary. It is named in the Pharmacopœia under the title "Acetanilide."

Phenacetin was patented and introduced by Bayer & Company. It is named in the present Pharmacopœia under the name of "Acetphenetidin," another example of the Pharmacopœia coining a name for a patented article, so as not to use the patented name.

Lanolin was introduced by Liebreich. It is now recognized in our Pharmacopœia as "Adeps Lanae," or the lard of the sheep.

499 Urethane was introduced by Meister Lucius and Breuning, and is now in the Pharmacopœia under the name of "Aethylis Carbonas."

Antipyrine was originally introduced by the German firm of Knorr, I believe. It is now in the Pharmacopœia under the name of "Antipyrina."

Various manufacturers introduced a solution of Hydrogendioxide under proprietary names such as Dioxygen. It is now in the Pharmacopœia under the name of "Aqua Hydrogenii Dioxidi."

Pond's Extract, extract of Witch Hazel, was introduced as a specialty, by Pond as a proprietary, and has sold as such for many years. It is now in the Pharmacopœia as "Aqua Hamamelidis," Water of Witch Hazel.

Saccharin was discovered by Fahlberg, sold in the trade under several names, such as Saccharin and Glusidin. It is now in the Pharmacopœia under the chemical designation of "Benzosulphinidum."

Antiphlogistin and Koalin Cataplasms have found in the Pharmacopœia representation under the name of Cataplasma Kaolini.

Chloralformamide or Chloralamid, introduced by Schering. That is now in the Pharmacopœia under "Chloralformamidum."

Duotal was introduced by Bayer & Company, likewise by the Heyden Chemical Company as a proprietary, and patented. It is now on the market under its chemical name and in the Pharmacopœia under the chemical name of "Guaiacolis Carbonas."

Schering & Company introduced Urotropin, and Merck & Company followed with the name Formin and other houses took the names Cystogen, Uritone, Hexamine and Hexacystine, and the Pharmacopœia took the name of "Hexamethylenamina" for the same article.

Iodol was introduced as a patented chemical by Kalle. It is now in the Parmacopœia under the name of "Iodolum."

To replace Listerine and similar antiseptic solutions the
500 Pharmacopœia has adopted the name of "Liquor Antisepticus."

To replace Lysol and similar proprietary phenol solutions the Pharmocopœia has introduced "Liquor Cresolis Compositus."

To replace Formalin, of Schering, the Pharmacopœia has introduced "Liquor Formaldehydi."

For Fowler's Solution of Arsenic, which I spoke of before, the Pharmacopœia has introduced "Liquor Potassii Arsenitis."

To replace Melachol, which was introduced by the Alta Pharmacal

Company of St. Louis as a proprietary—that has now been replaced by "Liquor Sodii Phosphatis Compositus" in the Pharmacopœia.

To replace such proprietaries as Tanret's Pelleteriene the Pharmacopœia standardized "Pelletierinæ Tannas."

To replace the various petroleum jellies marketed under trade names as Vaseline, Cosmoline, Lucilline, Fossoline, and so on, the Pharmacopœia coined the name "Petrolatum."

Salol was introduced by Sahli. It is now in the Pharmacopœia under the chemical name of "Phenylis Salicylas."

Rochelle Salt was a secret preparation of a French pharmacist and kept secret for more than fifty years. It is now in the Pharmacopœia under the title of "Potassii et Sodii Tartras."

Dover's Powder was a secret formula of Dr. Thomas Dover. It is now in the Pharmacopœia under the name of "Pulvis Ipecacuanhæ et Opii."

Compound Powder of Morphine, a formula of Dr. William Tully, is now in the Pharmacopœia under the title of "Pulvis Morphinæ Compositus."

Trional, a patented chemical introduced by Bayer & Company is now in the Pharmacopœia under the name of "Sulphonethylmethanum."

Sulfonal, also a patented chemical, introduced by Bayer
501 & Company, is in the Pharmacopœia under the title of "Sulphonmethanum."

Easton's Syrup became very popular both in England and America, and is now in the Pharmacopœia under the title of "Syrupus Ferri, Quininæ et Strychninæ Phosphatum."

Various syrups of the Hypophosphites, after the formula of Dr. Churchill, have been replaced by the official formula for "Syrupus Hypophosphitum."

Compound syrups of the Hypophosphites, containing quinine, strychnine and so on, such as Fellows' syrups, have been replaced by the official formula "Syrupus Hypophosphitum Compositus."

Aristol was a patented chemical, introduced by Bayer & Company and is now in the Pharmacopœia under the title of "Thymolis Iodidum."

Turlington's Balsam is one of the old fashioned patented medicines and is now in the Pharmacopœia under the name of "Tinctura Benzoini Composita."

Laudanum, I have already referred to as being a preparation originally originating with Paracelsus, remaining in the Pharmacopœia, and in most of the pharmacopœias, as "Tinctura Opii."

To replace Wister's Lozenges, a formula very, very popular around Philadelphia, the Pharmacopœia has a formula for "Trochisci Glycyrrhizæ et Opii."

To replace Spitta's Lozenges, another old time lozenger, "Trochisci Cubebæ" has been introduced by the Pharmocopœia.

To replace the various bitter wines of iron that were advertised as patent medicines and proprietaries, the Pharmacopœia has a standard bitter wine of iron under the title of "Vinum Ferri Amarum."

Q. 67. Will you please state whether all or most or how many of the original preparations you have referred to as proprietary were originally introduced by a single house or concern as proprietary medicines.

(Objected to as immaterial, incompetent and irrelevant.)

502 A. I could enumerate in this series of titles of Pharmacopœia titles at least twenty-eight that were introduced originally as proprietary or patented articles.

(Mr. Rawle states that the witness produced a type-written list, and testified from that list.)

(Counsel stipulates that the answer to the question giving the names of these articles can take the place of the list, and that the list itself shall not be offered in evidence.)

The Witness: Twenty-eight of these were either distinctly protected by proprietary rights or patent rights.

By Mr. Rawle:

Q. 68. Referring to the twenty-eight proprietary articles or patented articles, which are found among the list you have just put on the record, will you please state whether or not subsequently to their introduction by the originator, they were marketed by some or many other houses or concerns before they went into the United States Pharmacopœia?

(Objected to as immaterial, incompetent and irrelevant.)

A. The pharmaceutical preparations were marketed, as a rule, by a number of pharmaceutical manufacturers, and the use became general before they were taken up and standardized for the Pharmacopœia. The patented chemicals were not, as a rule, made official until after the patents had expired, and the right to manufacture by others than the original patentees became public property.

Q. 69. When drug manufacturers other than the originator began to market these twenty-eight various preparations you have enumerated, will you state whether what they marketed was the same in color, taste, and therapeutical effect as the original?

(Objected to as immaterial, incompetent and irrelevant.)

503 A. Substantially, they were the same.

Q. 70. Will you state whether or not the various concerns who marketed them after they were originally put out, marketed them under the same or under another name?

(Objected to as immaterial, incompetent and irrelevant.)

A. At times the names were very similar, sometimes they were identical by several manufacturers and at other times the names had been coined, and changed a little, so as to give a distinctive type to the individual manufacturer. That is shown, and very plainly, by

the list of titles for mineral oil. It showed the custom and that has to do throughout most of the preparations mentioned.

Q. 71. Will you state whether or not this list you have just given includes both simple preparations and compound mixtures?

(Objected to as immaterial, incompetent and irrelevant.)

A. The list covers both simple chemical products and compound pharmaceutical preparations.

Q. 72. Will you explain the difference between the two terms?

(Objected to as immaterial, incompetent and irrelevant.)

A. The term that I used "simple chemical product" was used to indicate a distinct chemical compound, as, for example, Acetanilide. The term "compound pharmaceutical preparation" was used to designate a preparation composed of several ingredients which are put together to make an acceptable form for administration. For example, we will take the Compound Syrup of Hypophosphites as an illustration of the use of that term.

At 1:15 P. M. a recess was taken until 2:15 P. M.

504 At 2.30 p .m.

Present: Parties as before noted.

GEORGE M. BERINGER.

Direct examination resumed.

By Mr. Rawle:

Q. 73. Can you produce a list of preparations taken from the National Formulary which had originally, when first introduced, been proprietary and which subsequently found their way into the National Formulary; give if you please the original name as introduced, the name of the original introducer, the names, if any, of manufacturers who afterwards marketed the product, and the National Formulary name?

(Objected to as immaterial, irrelevant and incompetent.)

A. The following titles appear in the National Formulary as substitutes for proprietaries previously advertised:

"For S. Celerina introduced by the Rio Chemical Company and advertised, appears in the Formulary a Compound Elixir of Celery Seed under the title of Elixir Apii Graveolentis Compositus.

For Wheeler's Elixir, the proprietary introduced by Wheeler & Company, who I think were Canadian people, and afterwards made by a number of manufacturers containing the constituents of Cinchona Bark, associated with iron and calcium, the National Formulary has introduced the formula under the title of Elixir Cinchonæ, Ferri et Calcii Lactophosphatis.

For the Lacto-Peptine, both in the powder form, and in the form of Elixir, introduced by the old firm of Reed & Carnrick, now the New York Pharmacal Association, and successfully exploited and then made by all the manufacturers, the National Formulary
505 introduced two formulas, the Pulvis Pepsini Compositus and the Elixir Digestivum Compositum.

Gray's Glycerine Tonic was the name of a formula introduced by Purdue, Frederick & Company of New York. It was based upon an old physician's prescription and became very popular, and a similar formula was then made by nearly every pharmaceutical manufacturer and it has been introduced in the National Formulary under the title "Elixir Gentianæ Glycerinatum."

Essence of Pepsin was originated by Fairchild Brothers & Foster of New York, and was then made by nearly every drug firm and manufacturing pharmacist. For this the National Formulary has introduced the formula Essentia Pepsini.

Angier & Company of Boston introduced Emulsion of Petroleum with Hypophosphites, which has become popular, and similar formulas then appeared on most of the manufacturers' lists, and for this the National Formulary has a formula, Emulsum Petrolei, containing Hypophosphites.

Gylco-thymoline, adopted by Cress & Owen, who introduced this under that name, an alkaline antiseptic fluid colored red, has been imitated by nearly all manufacturers and has become very popular. For this the National Formulary has a formula, Liquor Antisepticus Alkalinus.

Under the title of Arsenauro was introduced a solution of gold and bromide of arsenic, then made by several manufacturers, and for this the National Formulary has introduced a formula, Liquor Auri et Arseni Bromidi.

Solutions of Peptonate of iron with Manganese have been introduced largely through the advertisement of Gude's Pepto-Mangan. Originally these formulas were proposed by a German pharmacist, Dietrich, and have been very popular both abroad and in this
506 country. The National Formulary has now introduced this formula under the name of Liquor Ferri Peptonati cum Mangano.

Phillips introduced Milk of Magnesia. It has now become exceedingly popular and is manufactured by many pharmaceutical houses, and for this we have in the National Formulary a formula, Magma Magnesiæ. This is now to be taken over by the Pharmacopœia.

Bromidi was introduced as a proprietary title by a manufacturing company of St. Louis for a hypnotic containing chloral and bromides. Nearly all the manufacturers then manufactured a similar preparation under the title of an elixir, and the National Formulary has introduced the formula under the title of Mistura Chlorali et Potassii Bromidi Composita.

Tasteless syrup of iodide of iron was introduced many years ago by a New York firm, Crews & Company. To replace this the National Formulary has introduced a Syrupus Ferri Citro-Iodidi.

Phillips introduced the Phospho-muriate of Quinine, containing phosphates and a muriate of quinine in a syrup. This was then made by most of the manufacturers as syrups of phosphates with quinine, and the National Formulary has introduced the formula under the name of Syrupus Hydrochlorophosphatum.

Many years ago Parrish & Company of Philadelphia at that time introduced what was known as Parrish's Chemical Food, a preparation containing the phosphates of calcium, sodium, potassium and iron in the form of a syrup. This very soon became popular and has been made by most of the manufacturers, some of whom advertised it as a proprietary or specialty. The National Formulary has a formula under the name of Syrupus Phosphatum Compositus.

Hayden popularized a preparation as Hayden's Viburnum Compound, and similar preparations became very popular and were made by most of the manufacturers. The National Formulary has introduced this under the title of Tinctura Viburni Opuli Composita.

507 Resinol was introduced by the Resinol Chemical Company of Baltimore as a title for an ointment containing Resorcinol. It has been made by most of the pharmaceutical houses and is now in the National Formulary under the title of Unguentum Resorcini Compositum.

That completes the list. I have omitted from that list the old residenters that have come down from the great grandfathers.

Q. 74. Please state whether or not in each instance you have mentioned the original preparation as marketed, the preparations marketed by other houses which you have spoken of, and the preparation put in the National Formulary were alike in taste, color and therapeutic qualities?

Mr. Bradford: Same objection.

A. They closely similated the proprietaries.

Q. 75. To what extent did the subsequent preparations put out by the subsequent houses, in assimilating the product, use the name?

A. In some cases almost exactly they assumed the name and in other cases they modified it.

Q. 76. In giving this list please state whether or not between the original marketing by the original introducer and the incorporation of the formula in the National Formulary, each particular product was more or less extensively marketed by other houses.

Mr. Bradford: Same objection.

A. In each of the cases mentioned that was so.

Q. 77. State whether or not you have had, as a member of the Revision Committee of the National Formulary, anything to do with the proposed placing in the National Formulary a formula for a syrup of chocolate quinine.

Mr. Bradford: Same objection.

508 A. The committee had under consideration a report from one of the sub-committees recommending the introduction

of a formula for a syrup of quinine with chocolate. When a vote was taken, twelve out of the fifteen members of the committee voted, and the vote was unanimously in favor of admitting such a formula. It was referred to a sub-committee, of which I was the chairman, and we tried out a number of formulas that were submitted, and they were not entirely satisfactory, so it remains the one subject on which that committee has not filed a final report and for which a formula has not yet been accepted.

Q. 78. With what committee, if any, is the subject now lodged for further consideration and report?

Mr. Bradford: Same objection.

A. It still remains as an unfinished business with the sub-committee B, of which I was and am chairman.

Q. 79. Have you in connection with this work as chairman experimented on a formula for such a preparation and given it consideration, and to what extent?

A. I have tried a number of formulas and have done considerable experimental work on the matter and probably, if I could have devoted sufficient time, we would have adopted a formula. I have had as you can realize from the number of assignments, a great deal of work to do, both in relation to the Pharmacopœia and the National Formulary, and this is the one subject on which I have not yet filed a final report, and the only one that I recall that I have not filed a report on.

Q. 80. State whether or not the adoption of a formula is or may be anything different from a knowledge of the ingredients; is there anything to be considered in adopting a formula other than to ascertain what ingredients are to go into it?

Mr. Bradford: Same objection.

A. That is only part of the formula. The method of combining those ingredients, the securing of right proportions, the
509 methods of manipulation, are what make the success of the formula. To illustrate, some of the experiments resulted in a syrup which was too rich in chocolate and too rich in the fat of chocolate, and we got a preparation that did not pour, with a separation of fat on the top that clogged it up, and other formulas contemplated placing the quinine in solution, which is an initial error, because the quinine must not be in solution. So we have experimented along the lines, and have not yet arrived at a conclusion that I felt justified in submitting as a formula for adoption.

Q. 81. Will you state whether or not the difficulty you mentioned exists more with regard to some formulas than with regard to others?

Same objection.

A. The difficulty of constructing formulas varies very decidedly in different formulas. Some are very simple, and others require a knowledge of the peculiarities of the constituents and sometimes a rather intricate process of manipulation to get the proper results.

Q. 82. Would you place a syrup of chocolate quinine preparation among the more difficult or more simple formulas?

A. Among the more difficult.

Q. 83. To illustrate the greater or less difficulty in deciding upon a formula, can you name one or two formulas which are now in the National Formulary and which were difficult of ascertainment before they went in?

Mr. Bradford: Same objection.

A. Yes, Elixir Iron Quinine and Strychnine was one of the problems. Compound tincture of Viburnum Opulus has been a matter of experimentation. Syrup of Phosphates of Iron, Quinine and Strychnine has been a matter of experimentation. Some of the fluid extracts have been rather difficult to determine the right menstruum and process to use in manipulation.

510 Q. 84. If there are, as has been testified, a dozen syrup of chocolate and quinine preparations made by different makers, now on the market, will you state why you should not adopt one of those formulas and put it into the National Formulary?

A. I know of no reason provided the formula, when tested out, is satisfactory. I would not give a carte blanche that it would be adopted without testing it out.

Q. 85. Do you know the formula of any of those preparations?

A. I have never seen the formulas of any of the manufactures.

Q. 86. If you had one of those formulas and it was satisfactory, would you use it in the National Formulary?

(Objected to as immaterial, incompetent and irrelevant.)

A. If I had the formula submitted and it was satisfactory and the book was not too far advanced, to have it incorporated, I would endeavor to have it incorporated in the present edition. If not, I would hold it over for the next edition.

Q. 87. And in any case report in favor of its adoption?

(Objected to as immaterial, incompetent and irrelevant.)

A. Yes, if it was satisfactory.

Q. 88. Can you refer to the records and reports in connection with the National Formulary, giving the successive steps that have been taken in regard to the placing of a chocolate syrup of quinine preparation in the National Formulary.

(Objected to as immaterial, incompetent and irrelevant.)

A. I have the records showing the actions taken by the committee regarding this formula, the official correspondence of the

511 committee. I have before me the official correspondence of the Committee on Revision of the National Formulary sent out to the members of committees. In letter No. 20, page 104, is reported the vote on the proposed additions. Syrup of Quinine with chocolate is listed with those that have been approved by all the members voting, twelve in number.

On page 458 is a record of the minutes of a meeting of the Committee held in Boston on August 12th, 1921. There occurs the following statement:

"The following was continued with Committee B: Sterilization, Syrup of Quinine and Chocolate,"—two topics still retained by the Committee.

On page 466 is the report of the Committee of the National Formulary to the American Pharmaceutical Association which contains a list of items which the Committee reported to the Association were to be titles in the revision of the National Formulary. Among the list of agreed titles occurs on page 466 "Syrup of Quinine with Chocolate".

On page 494 is a record of articles accepted and not yet reported on. There occurs under the number 61, "Syrup of Quinine and Chocolate, Committee B", showing to whom it had been assigned.

On page 505 is a list of unfinished work remaining before the Committee. Under the title "A, Additions, accepted for which no formulas have been given", is stated as Number 61, Syrup of Quinine and Chocolate.

Under date of July 26th, 1912, I wrote to Professor C. Louis Diehl, Chairman of the Committee on National Formulary Revision:

"I believe in this report I am completing the assignments that have been made either to me personally or to Sub-Committee B, with one exception, namely, Syrup of Quinine and Chocolate, for which an entirely satisfactory formula has not yet been agreed upon."

Q. 89. State whether or not you were present at a meeting either of your National Formulary Committee or of a joint committee of both bodies, at which there was any reference made to placing this preparation in the National Formulary, and which meeting was presided over by Mr. Eldred?

512

A. I don't recall being present at any such meeting.

Q. 90. Will you state whether or not Mr. Eldred is on any committee which has dealt with this subject?

A. Mr. Eldred is on a committee on standards for unofficials which is preparing the standards for part two of the National Formulary. This will cover the ingredients going into the formulas of the National Formulary which have not yet been standardized by the Pharmacopœia for which we will need necessarily standards to get uniform products. He has seen the discussions of standards in that committee, but has not been a member of the National Formulary Revision Committee.

Q. 91. State what is your opinion as to the newness or novelty of supplying quinine sulphate in a chocolate syrup as compared with supplying quinine sulphate in coated pills, tablets, capsules or elixirs?

A. Those various forms of administering quinine, when they were proposed, were considered quite as much in advance as the introduction of a palatable syrup containing quinine. I recall quite well when compressed pills were first introduced, gelatine coated pills, and we—I say "we", I mean the old firm I was with—were the first manufacturer I guess in this country of sugar coated pills. So

that I recall, as I say, when pills were first introduced, prepared pills, and when tablets were put on the market compressed and finally coated with sugar and with chocolate, and when the filled capsules, as improved forms of dispensing quinine, were introduced upon the market, they were looked upon with quite as much favor and as quite as much in advance as have been some of the later attempts to supply a liquid preparation of quinine.

Q. 92. Will you state whether the Revision Committees
513 of the United States Pharmacopœia and the National Formulary have in their practice and methods considered that it could standardize and place in the United States Pharmacopœia or National Formulary any open formula preparation which had originally been carried by a particular house as a proprietary and had come into quite general use.

(Objected to as immaterial, incompetent and irrelevant.)

A. Both of these committees engaged in the revisions of these works have considered as well within their province to standardize formulas that have been looked upon as open formulas, even proprietary formulas. In the revision of the Pharmocopœia I may add that there has even been some discussion as to the advisability of standardizing patented chemical products which have been frequently used. An example of that was in Aspirin. There was quite a strong sentiment that we should standardize Aspirin, even though the patent is still in existence, because of its general use.

Q. 93. State whether or not the United States Pharmacopœia or National Formulary Committees have ever standardized and placed in their respective publications patented products?

(Objected to as irrelevant, incompetent and immaterial.)

A. Up to the present revision they have not.

Q. 94. You have referred to the practice of standardizing and placing in one or the other of these publications proprietary articles. State whether or not that has been the uniform practice with the Committees in suitable cases?

(Objected to as irrelevant, incompetent and immaterial.)

A. My examination of the works of the previous commit-
514 tees leads me to conclude that they have adopted that as one of their privi*el*ges and rights.

Q. 95. State whether or not in the general history of the drug business in your day, when one drug manufacturer has put out an open formula proprietary preparation which has been successful on the market, other drug manufacturers have put out and marketed a preparation of a similar or like formula, and to what extent this has been common practice among drug manufacturers?

(Objected to as irrelevant, incompetent and im*am*terial.)

A. It has been a custom of the drug trade that when a formula is placed on one of the manufacturers' lists and exploited success-

fully, the other manufacturers very promptly manufacture the same or a similar article and advertise it and share in the profits. I have in mind as illustrating just what I thought of a couple of formulas for pills that are now known all over the country, for example, the Hinkle formula of Pill Cascara, put out by William R. Warner & Company, as a pink coated laxative pill containing extract of cascara. The formula is now I believe on all of the lists of the manufacturers of pills. Another example along the same line is the Compound Sumbul Pill, Professor Goodell's formula originally. Professor Goodel used to come into the store and I made him up those pills by hand when they were first made,—Assafœtida, Iron and Sumbul. Finally we got to making them and keeping them on hand, and when the demand became general we put them on the list and published the formula on the label. To-day they are made by all the manufacturers in pill or tablet form, and it is a very popular formula, an open formula. At the time I wanted the firm I was with to copyright the article, and trade-mark the name, but they would not do it, would not consider it, thought it was un-
515 ethical, would not consider that at all. To-day that pill is sold in millions and millions. The same may be said of the Lapactic Pill of Sharp & Dohme. That was a pill formula containing Aloin, Extract of Belladon-a and Ipecac and Strychnine. That is being made to-day by the different manufacturers of pills, either under that name or under the name of Pill Evacuant.

Q. 96. Will you state how common or universal this practice is in the drug manufacturing business?

(Objected to as incompetent, irrelevant and immaterial.)

A. I would say it is practically a universal custom in the drug trade. It is a fashion, otherwise, of the times.

By Mr. Rawle:

Q. 97. Can you produce a statement showing a list of proprietary preparations with the names of the original introducers, and showing the names of drug manufacturers who have subsequently marketed each preparation, giving the name of the subsequent drug house and the name under which such drug house marketed the same?

(Objected to as immaterial, incompetent and irrelevant.)

A. I have prepared a list of some of the noted examples of that character. For example, Elixir Catnep and Fennel introduced by John Wyeth & Brother. Sharp & Dohme list it now as Elixir of Catnep and Fennel. Eli Lilly & Company have it on their list as Elixir of Catnep and Fennel. H. K. Wampole & Company have it on their list as Carminative Elixir.

Creo-Terpin introduced by H. K. Wampole & Company. The following manufacturers now list similar formulas:

Sharp & Dohme, Elixir Creosote and Terpin Hydrate Compound.

Park, Davis & Company, Elixir Creosote and Terpin Hy-
516 drate Compound.

Eli Lilly & Company, Elixir Creosote and Terpin Hydrate Compound.

H. K. Mulford Company, Elixir Terpin Hydrate and Creosote Compound.

William R. Warner & Company, Elixir Terpin Hydrate and Heroin Compound.

Elixir of Lactopeptine, to which I referred before, owned by the New York Pharmacal Company, is imitated by every one of the manufacturers, listed generally as elixirs of lactated pepsin, compound digestive elixir.

Elixir Salicylic Comp. introduced by William R. Warner & Company. It now appears on the lists of Sharp & Dohme, Parke, Davis & Company, Eli Lilly & Company, H. K. Wampole & Company, John Wyeth & Brother and H. K. Mulford & Company, and the title in nearly every instance is Elixir Silicylic Acid Compound.

Peptonising tubes, introduced by Fairchild Brothers & Foster; on the list of Parke, Davis & Company, John Wyeth & Brother, there appear peptonising powder in tubes. Sharp & Dohme make the same formula as peptonising tablets.

Ichthyoldin, introduced by H. K. Mulford Company, is now on the list of Sharp & Dohme under the name of Iodythol, Parke, Davis & Company has Thiodine, and Eli Lilly & Company has Ichthyol-Iodine Compound.

Aletris Cordial, introduced by the Rio Chemical Company, is now on the list of Sharp & Dohme as Compound Cordial of Unicorn; Parke, Davis & Company as Compound Elixir of Aletris; Eli Lilly & Company as Compound Cordial of Aletris; H. K. Wampole & Company as Compound Elixir of Aletris; John Wyeth & Brother as Elixir of Unicorn Compound; H. K. Mulford & Company, William R. Warner & Company and Sharp & Dohme as Elixir of Aletris Compound.

517 Colchi Sal, introduced by E. Fougera & Company of New York. A similar formula appears on the lists of Sharp & Dohme, as Globules of Colchicine and Methyl Salicylate; Parke, Davis & Company as Globules of Colchine and Methyl Salicylate; Eli Lilly & Company as Globules of Colchicine and Methyl Salicylate; H. K. Wampole & Company as Colchici-Methyl Capsules with the addition of salol to the formula; John Wyeth & Brother, Globules of Colchicine and Methyl Salicylate; H. K. Mulford & Company as capsules of Colchicine and Methyl Salicylate; and William R. Warner & Company as Pearls of Colchicine and Methyl Salicylate.

Glyco Heroin, introduced by Martin H. Smith Company of New York, containing heroin, cannabis and ammonium hypo-phosphite, with glycerine. Now on the list of Sharp & Dohme as Elixir Glycerin and Heroin Compound; Parke, Davis & Company as Glycerinated Heroin Compound; Eli Lilly & Company as Glycerin Heroin Compound (Lilly); John Wyeth & Brother as Syrup Glycerite Heroin Comp.; William R. Warner & Company as Glycerole Heroin Compound.

Gray's Glycerine Tonic introduced by Purdue Frederick Company, appearing on the lists of Sharp & Dohme as Elixir of Gentian and Glycerin Comp.; Parke, Davis & Company as Elixir Gentian Compound Glycerinated; Eli Lilly & Company, Glycero-Tonic Compound (Lilly); John Wyeth & Brother, Elixir Glycerole Tonic Compound; H. K. Mulford Company as Elixir Gentian Glycerinated Compound and William R. Warner & Company as Elixir Glycerole-Gentian Compound.

Lithiated Hydrangea, introduced by Lambert Drug Company of St. Louis, now appears on the list of Sharp & Dohme, Parke, Davis & Company and Eli Lilly & Company as Elixir Lithium & Hydrangea. On the lists of William R. Warner & Company, John Wyeth & Brother and H. K. Wampole & Company it appears as Elixir Hydrangea and Lithia, and on the list of H. K. Mulford Company as Elixir Lithium Hydrangea Compound.

518 Bromidia introduced as a hypnotic preparation by Battle & Company of St. Louis. It appears on the lists of Parke, Davis & Company as Elixir Bromide and Chloral Compound; Eli Lilly & Company as Elixir Bromide Chloral Compound (Lilly); H. K. Wampole & Company, Hypno Bromic Compound with the addition of some Morphine; H. K. Mulford Company, as Elixir Sedative and William R. Warner & Company as Elixir Hypnotic Compound.

Resinal, introduced as a proprietary ointment by the Resinol Chemical Company of Baltimore. A simular formula now appears on the lists of Sharp & Dohme as Res Unguentum; Parke, Davis & Company, as Ointment Resorco; Eli Lilly & Company as Unguentum Resorcinol Compound (Lilly); H. K. Wampole & Company, Unguentum Resorcin Compound; H. K. Mulford & Company, Ointment Resorcin Comp. Improved and Schieffelin & Company as Ointment Resorcin Comp. S. & Co.

Glyco Thymoline introduced by Kress & Owen. On Sharp & Dohme's list there is a similar preparation as Alkaline Antiseptic Solution; Parke, Davis & Company, as Alkathymol; Eli Lilly & Company, Alkaline Antiseptic (Lilly); H. K. Wampole & Company, Solution Thymol Compound; John Wyeth & Brother, Solution Alka Thyptol; H. K. Mulford & Company, Thym-Alka; William R. Warner & Company, Alka-Men-Thym; Schieffelin & Company, Bensolyptus.

H. K. Wampole & Company and Frederick Stearns & Company almost simultaneously advertised and exploited a tasteless extract of cod liver oil containing wild cherry and hypophosphites. Sharp & Dohme now list a Wine of Cod Liver Oil Extract with Wild Cherry and Hypophosphites; Parke, Davis & Company have a Nutritive Cordial; Eli Lilly & Company have a Wine of Cod Liver Oil Extract with Cherry and Hypophosphites; John Wyeth & Brother have a

519 Wine of Cod Liver Oil Extract with Cherry and Hypophosphites; H. K. Mulford & Company have a Wine of Cod Liver Oil Extract with Cherry and Hypophosphites; William R. Warner & Company have a Wine of Cod Liver Oil Extract with Wild Cherry and Hypophosphites.

Vinol was introduced by Chester Kent & Company of Boston, as a vinous preparation of extract of cod liver oil with iron peptonate. Eli Lilly & Company now have on their list a Wine of Cod Liver Oil Extract with Iron; John Wyeth & Brother have a Wine of Cod Liver Oil Extract Ferro-Peptonized; H. K. Mulford & Company have a Wine of Cod Liver Oil Extract with Iron Peptonate and William R. Warner & Company have a Wine of Cod Liver Oil Extract with Peptonate of Iron and Manganese.

Unguentine was adopted by the Norwich Pharmacal Company of Norwich, New York, for an ointment containing alum, ichthyol and aromatic phenols. A very similar formula is now on the list of Parke, Davis & Company under the name of Emollientine; on the list of Eli Lilly & Company as Ointment of Alum Compound. On the list of H. K. Mulford Company as Ointment of Aluminum Hydrate Compound.

Tongaline introduced by the Mellier Drug Company of St. Louis, now appears on the list of Sharp & Dohme as Elixir Tonga and Salicylates; Parke, Davis & Company as Elixir Tonga Compound; Eli Lilly & Company as Elixir Tonga Compound; H. K. Mulford & Company as Tonga Salicyl or Elixir Tonga Compound; H. K. Mulford Company as Elixir Tonga Compound; John Wyeth & Brother as Elixir Tonga Compound and William R. Warner & Company as Elixir Tonga Compound (S. & H.).

Baume Analgesique, marketed by Dr. Bengue of West Hoboken, New Jersey, an ointment in collapsible tubes, containing menthol and methyl salicylate. Now under the title of Analgesic Balm, a similar formula appears on the lists of Sharp & Dohme, Parke, Davis & Company, Eli Lilly & Company, Schieffelin & Company,
520 and on the list of H. K. Mulford Company as Mentholic Balm.

Emulsions of Petroleum associated with hypophosphites introduced by the Angier Company of Boston. Sharp & Dohme now list Petroleum Compound Emulsion with Hypophosphites, Parke, Davis & Company, Petroleum Emulsion with Hypophosphites; Eli Lilly & Company, Emulsion Petroleum Compound with Hypophosphites; H. K. Wampole & Company, Emulsion Petroleum with Hypophosphites, Lime and Soda, and William R. Warner & Company, Emulsion of Petroleum and Hypophosphites.

Q. 98. State whether or not the various preparations you have just referred to as originally marketed by one house and then marketed by the houses you have named were similar in taste and color and of like therapeutic effect?

(Objected to as incompetent, irrelevant and immaterial.)

A. The formulas stated are essentially identical.

Q. 99. State whether or not the drug houses that you have referred to in the enumeration of preparations introduced by one house and then marketed by other houses, are the leading drug manufacturing concerns in the United States?

A. They are looked upon as the leading pharmaceutical manufacturers.

(Mr. Rawle makes the same statement in regard to the list furnished from the National Formulary as he did with regard to the list furnished by the witness as to the United States Pharmacopœia.)

By Mr. Rawle:

Q. 100. I understand that you carry on a retail drug business in Camden, New Jersey?

A. I do, yes, sir.

Q. 101. Will you state whether or not you carry about
521 the average amount of stock or more than the average?

A. My stock is very much in excess of what the average store carries, because of my doing some physicians' supply business and a general jobbing business. So I carry a much more complete variety and a heavier stock than is commonly carried by the druggists.

Q. 102. State whether or not the average drug store usually carries a stock of similar preparations made by different drug manufacturers which are interchangeable in therapeutic effect?

(Objected to as immaterial, irrelevant and incompetent.)

A. A pharmacist to-day is compelled to carry, not infrequently, a number of preparations of identical formulas made by different manufacturers. The doctors, not infrequently, specify on a prescription the make that they want supplied, and we consequently have to carry three or four makes, sometimes half a dozen different makes, of the same formula and article.

Q. 103. Can you approximate the number of preparations in which an average equipped drug-store does carry two or three or four different makes of the same preparation?

(Objected to as immaterial, irrelevant and incompetent.)

A. That would be simply an approximation. I should imagine approximately that there are at least one hundred articles carried by the well equipped drug store which are duplicates of the same articles made by different manufacturers.

Q. 104. And in each case the articles are of similar therapeutic effect?

(Objected to as immaterial, irrelevant and incompetent.)

A. Presumably identical.

522 Q. 105. On a prescription specifying a preparation or drug, but not specifying the maker, what course is open to the druggist?

(Objected to as immaterial, irrelevant and incompetent.)

A. The pharmacist can then use his own discretion as to which manufacture of product he will use.

Q. 106. What, if the prescription specifies the particular make of the drug, is the course open to him.

(Objected to as immaterial, irrelevant and incompetent.)

A. Then he must dispense the article of the manufacturer specified.

Q. 107. If in such case he dispenses another make than the one specified, what is your opinion, and what is the opinion in the pharmacist business, of the propriety of such an act?

A. That is looked upon — unethical. It is a case of substitution.

Q. 108. If a drug store carries one hundred items, and of each item there are the makes of three or four different drug houses, state whether or not the opportunity for such substitution is open to the druggist?

A. If he is dishonest, it is.

Q. 109. Will you state what in your opinion is the training, generally speaking, and the standing of the prescription druggist?

A. The training is along lines very much higher than that of the average tradesman, and the standing of the drug trade is higher than that of the average tradesman.

Q. 110. Will you state whether or not the morals of the business are taught in the colleges?

A. My experience has been that considerable stress is laid on the training of the young pharmacist both at the college and by the preceptors in the stores upon the ethical side of the calling.

523 Q. 111. Will you state how generally in this country the law provides for the examination and the registration of pharmacists?

A. In practically every state we have a state pharmaceutical practice act under which a Board of Examiners is appointed who examine and pass upon the qualifications of each applicant for a license to practice pharmacy within that state. A number of the states have so amended their laws as to require that in addition to passing the examination, the applicant must be a graduate of a reputable school of pharmacy, and nearly every law, as well as in the requirements of the colleges for graduation, is a clause covering not only the qualifications of the applicant from a commercial and educational standpoint, but likewise his qualifications as to his morals and character, requiring a good moral character and not addicted to improper habits.

Q. 112. You have spoken of substitution as a dishonest practice. Will you state whether or not in the retail druggist business it is common?

A. In my experience it is rare that a case of substitution is practiced. That has been my personal experience.

Q. 113. Will you state what in your opinion would be the effect on a manufacturing drug house of having its salesmen go out on the road and suggest substitution to retail druggists whose business they were soliciting if such a thing became generally known?

A. My opinion is that such a thing would discredit the house represented, and would be a serious injury to their standing and to their business.

Q. 114. State whether or not in your opinion it is possible for a retail druggist, if he chooses, to push the sale of a particular article, and, if so, in what direction?

(Objected to as immaterial, incompetent and irrelevant.)

A. A retail druggist has many opportunities of pushing
524 the sale of articles. He is in direct contact with the physicians. In a popular store he gets in touch with the physicians in the neighborhood. He has a personal acquaintance which enables him to get their confidence and to approach them with articles in such a way that he can solicit trade in a proper way.

Q. 115. State whether or not you have ever compounded a chocolate syrup of quinine in your own drug store for your own customers?

A. I have made a syrup of quinine with chocolate. I had one customer, a physician, who asked me to make him a syrup of quinine containing chocolate and two grains of quinine sulphate to every fluid dram. We filled his order with quinine chocolate syrup containing yerba-santa. I think we filled his order a couple of times. He was a dispensing physician.

Mr. Rawle: Direct examination closed.

Cross-examination, without waiving objections, beginning at 4.25 p. m.

By Mr. Bradford:

X Q. 116. What reasons, if any, were given by the dispensing physician for desiring you to make this preparation for him?

A. He was a customer, and he simply asked whether I could make him a quinine syrup of that character, and what the price would be. He was an old customer whom I supplied goods to.

X Q. 117. Did he mention any other chocolate equinine preparations at the time the order was given?

A. No, sir, he did not.

X Q. 118. In the long list of proprietary preparations referred to by you, are they what are commonly termed general line items?

A. You mean the list of proprietary formulas that are now manufactured by different manufacturers?

X Q. 119. Yes.

525 A. I consider them so, yes. They are not listed on most of the lists as special. They are regular line articles.

X Q. 120. And so regarded in the drug trade?

A. Yes, sir, so regarded in the drug trade.

X Q. 121. The names adopted by the different manufacturers are, as a rule, purely descriptive of the articles, are they not?

A. The practice is to adopt a name——

X Q. 122. I am referring now to those particular names that you referred to.

A. —descriptive of the composition or intent of the article. One or the other. You have got to convey to the phyiscian or customer what the article is by its label.

X Q. 123. In the case of articles like Resinol, having a trade name, it is not customary to copy the name, is it?

A. No. That is a proprietary name, a protected name. You could not copy it.

X Q. 124. And the same is true with respect to other coined or special names, is it not?

A. The exact reproduction of the name?

X Q. 125. Yes.

A. You will notice, for instance, in Glyco Thymoline, how they have modified it, and some others, Ichtholdin, how they have modified it. They have modified the names so as not to copy them exactly, not to copy exactly the word, because the name is claimed as a proprietary name, a trade mark name.

X Q. 126. In the case of articles known in the trade by such names, and the prescription being written for the article by that name, what would be the proper practice of the druggist?

A. The proper practice would be to supply the article named on the prescription.

X Q. 127. I am referring now in respect to the manufacturer of the article.

526 A. If the proprietary name was mentioned on the prescription that would be the only thing to dispense, to which that name was attached.

X Q. 128. The manufacturer's product to which that name is attached?

A. Properly applied, yes, sir. That would be the only honorable thing to do.

X Q. 129. Then, it is not always necessary for a physician to specify by naming the maker on his prescription?

A. No. To illustrate what I mean; if I receive a prescription for Tongaline I would have no right to dispense anything else but Tongaline made by Mellier. That is their trade mark name, the accepted name.

X Q. 130. And if you received a prescription for Coco-Quinine, Lilly, what would you furnish?

A. I would furnish Coco-Quinine, Lilly, and do so. I do not know of any other Coco-Quinine.

X Q. 131. What quinine sulphate syrup with chocolate did you first know in the drug trade, in a commercial form?

A. I am under the impression it was Lilly's preparation, that we first had the call for.

X Q. 132. Do you remember about how many years ago?

A. No, I cannot tell the exact date, because with a varied business, that we do, with the thousand items, I cannot keep track when we first purchased that.

X Q. 133. Are there no other substances than chocolate and cocoa, which, in your judgment, might be used in a syrup preparation of quinine which would serve to suspend the quinine sulphate?

A. I do not know of a substance that would be practicable to use in place of the cocoa or chocolate in this preparation.

X Q. 134. Have you examined and analyzed Coco-Quinine, Lilly,

A. I have made a partial examination of Coco-Quinine,
527 Lilly, in connection with my work with the National Formulary. I did not go into it thoroughly, but I did make enough of an examination to acquaint myself with the fact of the active constituents and I confirmed practically the statement on the label.

X Q. 135. Was this the product your Committee was seeking to duplicate?

A. Not necessarily. It was not a question of duplication. It was a question of supplying a satisfactory formula for this class of preparations. That was probably one of the types that we would have to consider.

X Q. 136. Have you examined and analyzed Defendant's product Quin-Coco?

A. I have made a partial examination of that recently—more recently than I did the other.

X Q. 137. How recently?

A. Within the last few weeks I made a partial examination of it. I find that the two are very close.

X Q. 138. Did you notice any material differences in the two products?

A. There is some physical differences in the samples that I have examined.

X Q. 139. Any that would be apparent to the layman user?

A. Yes, I believe it would be apparent to the ordinary user.

X Q. 140. What differences do you have in your mind?

A. There is some little difference in the color which is to me quite distinct.

X Q. 141. In respect to their colors, which is the darker?

A. The S. & H. Quin-Coco is darker. It is distinctly shown.

X Q. 142. Thicker?

A. No, I do not think it is any thicker. I do not think it is any thicker. The samples I have examined seem to be about the same consistency. Theirs seemed to me to be slightly more sweet.

528 X Q. 143. That is, in the sample you examined recently?

A. Yes.

X Q. 144. At the same time did you compare it with the Coco-Quinine, or did you make a comparison from memory of your former analysis of Coco-Quinine?

A. No, I made a comparison with Coco-Quinine at the time, tasting the two consecutively, and reversing the order of tasting.

X Q. 145. Did you think there was such a difference as would distinguish them, one from the other, to the ordinary user?

A. Not in sweetness, not in the taste.

X Q. 146. Or in the appearance?

A. In the appearance, yes, I should say so. There is some difference in the appearance.

X Q. 147. Do you think a customer accustomed to using Coco-Quinine if given a bottle filled with Quin-Coco could tell the difference?

A. A critical customer could.

X Q. 148. From its appearance?

A. My experience has been that customers in drug stores are quite critical today. A little difference in flavor, or a little difference in shade of the color is noticed, and we have very frequently to explain why one tincture is a trifle different in shade from another, which is a matter we cannot control. Even such things as Nux Vomica and Belladonna and Digitalis. They frequently ask us for an explanation.

X Q. 149. Without observing the label, will you tell me which product is in this bottle? (Mr. Bradford took "Defendant's Exhibits, Beringer samples, Nos. 12 and 13," and after shifting them around in his hands, handed witness one of them, label concealed. The witness took the bottle, and holding it in his hand, with label side down, examined it and then answered.)

A. Will you let me see the other, so that I can make a comparison?

529 X Q. 150. No. The customer could not compare them.

A. All right. Then, I am simply judging, without a comparison of the two. I should say this was the S. & H., Quin-Coco.

X Q. 151. Now, will you observe the label, and state what it is?

A. (Witness after looking at the label answers): Coco-Quinine, Lilly. That was without the two together. With the two together, I can tell the difference in shade very quickly.

X Q. 152. In view of your recent experience in answer to the last question, is it not quite possible that a customer in your own store might be fooled if given one of these drugs for the other?

A. A customer might be fooled, but I say a critical customer, who had been taking and handling them, would note, probably, a difference very quickly. You have no idea as a layman how critical your customers are on that very point.

X Q. 153. Is it not also true that the list of items referred to as selected from the United States Pharmacopoeia and those selected from the National Formulary are considered as general line items, or common property, and have been so for a great many years?

A. Not all of them. Some were and some were not.

X Q. 154. I believe you stated, however, they were all manufactured by different houses, and in general use, before they were standardized in these publications?

A. The use warranted them being standardized, yes, sir. The use warranted us taking them up for standardization.

X Q. 155. You said you had not seen the formula of any manufacturer of a chocolate quinine preparation. I assume you referred to the working formula and not merely the formula stating the ingredients?

A. The statement of the ingredients was not the formula.

530 That is not the formula. I stated that the formula, in our usage of the word, means the entire monograph, covering the statement of the articles to be incorporated and the methods of manipulation.

X Q. 156. You spoke of what was your opinion of the rights of your committee to appropriate formulas of proprietary articles or,

perhaps it would be better to state, to make up formulas to duplicate the proprietary articles. On what theory do you base your right to do these things?

A. I have not any theory on the matter. The custom throughout, not only this country, but other countries which have Formularies and Pharmacopœias, is that it is looked upon as a proper method or mode of procedure to standardize formulas that were in common use. It was to give the medical men and the pharmaceutical men and the public alike the benefit of uniformity of standard formulas.

X Q. 157. In reference to the Sumbul Pill, which I understood was originally made by you for Dr. Goodell and put on the market by the house you were then connected with, Bullock & Crenshaw, you suggested to them that they should trade-mark or secure their rights on this preparation. What was your idea in making this suggestion?

A. Simply as a business proposition, that they might be keeping the formula private, and advertising it as a specialty, making it a profitable commercial venture.

X Q. 158. In testifying concerning the proprietary preparations you used a memorandum. Please state where you obtained the information contained on this memorandum?

A. Regarding the proprietaries?

X Q. 159. Yes.

A. Partly from goods in my store, commercial articles, and partly from the lists published, the price lists of the different manufacturing houses.

X Q. 160. On what do you base your statement in reference to the house that originated the several articles referred to?

A. Usually upon my personal knowledge and experience in the business.

X Q. 161. Can you state of your own knowledge that each item credited by you to a certain house as the originator was originated and marketed by that house before it was marketed by anyone else?

A. The names given were those of the original advertisers, introducing the thing to the public, who were presumably, as far as the drug trade knew, the originators of the articles.

X Q. 162. You referred to one item as being brought out simultaneously by the two houses?

A. Wine of Cod Liver Oil. It was advertised by Frederick Stearnes and H. K. Wampole & Company about the same time and for several years both firms advertised and exploited their preparations of Cod Liver Oil. I am rather inclined to think Wampole was the first to put it on the market, but they were advertised about the same time.

X Q. 163. Were not many of such preparations originally physician's prescriptions?

A. Some undoubtedly were, like, for example, Gray's Glycerine Tonic. I doubt if others were. Gray's Glycerine Tonic has always been credited to a physician who prescribed it and others got to using it, I think somewhere in the neighborhood of Utica.

X Q. 164. Was Coco-Quinine a physician's prescription?
A. Not that I know of. I never heard it so stated.
Deposition Closed.

GEORGE M. BERINGER.

Adjourned.

532 *Depositions on Behalf of Defendant, Taken Before George Brodbeck, Esq., Special Examiner, at the Office of Francis Rawle, Esq., 1001 West End Trust Building, Philadelphia, Pa., on Saturday, February 5, 1916, 10 o'clock a. m.*

Present:

Ernest W. Bradford, Esq., counsel for plaintiff.
Francis Rawle, Esq., counsel for defendant.

HARRY E. JAMES, a witness called in behalf of defendant, having been duly sworn, testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.
A. Harry E. James; 41; residence, 6809 York Road; occupation, cashier in the employ of William R. Warner & Company. I have been such for seven and a half years. I am at the Philadelphia office and have charge of the financial records at it. The Philadelphia office is the main office and St. Louis is a branch office. All the financial records are kept at the Philadelphia office.
Q. 2. Please state the net sales by William R. Warner & Company of all its products for the year 1914.
A. The net sales for 1914 were over $2,400,000.
Q. 3. Please state the net sales for 1915.
A. The net sales for 1915 were over $2,600,000.
Q. 4. Please state the net sales in 1914 of Quin-Coco.
A. Why, we have no accurate record of sales of Quin-Coco, but from our manufacturing records of Quin-Coco, Laxative Quin-Coco and Dr. Hobson's Sweet Chocolate Quinine, sales for 1914 would be less than $13,000. I would say that we kept no separate record of these three items.

Q. 5. Give the sales of the same for 1915.
533 A. For 1915 it would be less than $15,000.
Q. 6. How many traveling salesmen have you on an average on the road for 1914 and 1915.
A. From 75 to 80.
Q. 7. Taking 80 salesmen, what would be the average sales of each salesman for 1914 of these articles, per salesman per year?

Mr. Bradford: Objected to as immaterial.

A. About $160.
Q. 8. Give the figures for 1915, per salesman.

Mr. Bradford: same objection.

A. The figures for 1915 would be about $185.00.
Q. 9. Give the figures for each salesman per day for 1914 for these articles.

Mr. Bradford: Same objection.

A. Per day per salesman for 1914, $.50.
Q. 10. Give the figures for 1915 per day per salesman.

Mr. Bradford: Same objection.

A. Per day per salesman for 1916, $.60.
Q. 11. Give the total sales for all the products per salesman for 1914.

Mr. Bradford: Same objection.

A. Per salesman for 1914, per year, $30,000.
Q. 12. Give the figures per salesman for 1915.

Mr. Bradford: Same objection.

A. Per salesman, per year, for 1915, $32,500.
Q. 13. Give the sales per day, per salesman, for 1914, average.

Mr. Bradford: Same objection.

A. 1914, $100 per day, per salesman.
Q. 14. Give the same for 1915.

Mr. Bradford: Same objection.

A. 1915, per day, per salesman, $108.33.
334 Q. 15. Give the mail orders for Quin-Coco alone, received at both offices, direct from the customer, for 1915. I mean the number of individual orders.
A. The number of individual mail orders for Quin-Coco for 1915 was over 332.
Q. 16. What is the approximate value of these goods?
A. Over $2,100.
Q. 17. From what different classes of customers did these mail orders come?
A. From dispensing doctors and wholesale and retail druggists.
Q. 18. What are mail orders?
A. Mail orders are orders received by us from the customer.
Q. 19. Do you mean direct?
A. Direct from the customer.

Cross-examination.

By Mr. Bradford:

X Q. 1. What do you mean by "net sales"?
A. By "net sales" I mean after all deductions have been made for returned goods, trade and jobbing discounts, and allowances of all kinds.

X Q. 2. Do the figures given by you cover the sales of both William R. Warner & Company and the Pfeiffer Chemical Company?

A. Yes, sir.

X Q. 3. Including both offices, the Philadelphia and St. Louis offices?

A. Yes, sir.

X Q. 4. What means have you of knowing the figures determining the amount of sales at the St. Louis office?

A. The St. Louis office makes monthly reports to Philadelphia.

X Q. 5. Respecting this item?

A. Yes, sir.

535 X Q. 6. What were the amount of sales of Quin-Coco by William R. Warner & Company at its Philadelphia office and St. Louis office during the year 1913?

A. I don't know.

X Q. 7. What were the amount of sales of Quin-Coco by William R. Warner & Company and Pfeiffer Chemical Company at both St. Louis and Philadelphia offices in 1912?

A. I don't know.

X Q. 8. Have you any knowledge on this subject concerning years prior to 1914?

A. Well, I have no recollection of what they were.

X Q. 9. Would the records in your office show?

A. Possibly arrived at that on the same basis we arrived at 14 and 15.

X Q. 10. By making the same preparations, and by examining your books and records as to the years, you could answer these questions, I presume, the same as you have respecting the years 1914 and 1915.

A. I think so.

X Q. 11. And is that true of the years 1911, 1910, 1909 and 1908?

A. I don't know how far back I could go.

X Q. 12. Are all the financial records of the affiliataed companies handled by you at the Philadelphia office?

A. Yes, sir.

X Q. 13. Does the St. Louis office report to you each month respecting the amount of sales of each item handled by that office, including those manufactured there?

A. Do you mean each preparation?

X Q. 14. Yes.

A. No, sir.

X Q. 15. For what reasons are the reports made respecting the item Quin-Coco?

A. These we secured from our manufacturing record.

X Q. 16. For the express purpose of this deposition?

A. Well, I secured them for the express purpose of the deposition.

536 Redirect examination.

By Mr. Rawle:

R. D. Q. 1. State whether or not your records keep the account of all your products.

A. We keep no records of our various preparations.

R. D. Q. 2. What I want to ascertain is whether or not your manufacturing department keeps a record of all the preparations made.

A. Well, the manufacturing department keeps a record of preparations manufactured.

R. D. Q. 3. Of all preparations manufactured? Do you keep a record of all articles manufactured, here in Philadelphia?

A. Like of these three preparations, we keep a manufacturing record of the quantity manufactured.

R. D. Q. 4. Which three preparations do you mean?

A. The Quin-Coco, Quin-Coco Laxative and Dr. Hobson's Sweet Chocolate Quinine.

R. D. Q. 5. Then you keep a record of all your products manufactured?

A. Yes, sir.

Recross-examination.

By Mr. Bradford:

R. X Q. 1. On what other items do you receive a monthly report from the St. Louis office respecting their sales?

A. I don't understand that question.

R. X Q. 2. I understood you to testify that you received a monthly report from the St. Louis office respecting the sales of Quin-Coco. On what other items in the Warner line do you receive like reports from the St. Louis office?

A. I did not state we received monthly reports of sales of Quin-Coco.

R. X Q. 3. Then I misunderstood your testimony. What was your statement as to this?

A. Your question was whether we received a report of sales from the St. Louis office. Not sales.

537 R. X Q. 4. My question was directed to the single item Quin-Coco. If you did not so understand it I will ask you to please answer now with that understanding.

A. We do not receive monthly reports of sales of Quin-Coco from St. Louis.

R. X Q. 5. Do you receive monthly reports of the amount of Quin-Coco manufactured at the St. Louis office?

A. We do not receive monthly reports.

R. X Q. 6. What kind of reports do you receive?

A. Well, our reports of sales is the total net sales as shown on the trial balance.

R. X Q. 7. Then how do you arrive at the amount of Quin-Coco sales?

A. I explained that we kept no record of the sales of Quin-Coco, but taking from our manufacturing records which included Quin-Coco, Quin-Coco Laxative and Dr. Hobson's Sweet Chocolate Quinine, the sales of Quin-Coco would be less than $13,000 for 1914.

R. X Q. 8. What I am trying to get at is how you arrive at these figures from your report unless the item is separately mentioned or listed?

A. Our manufacturing records in St. Louis and Philadelphia show the quantity manufactured.

R. X Q. 9. Then, as I understand you, the net selling price of the amount of Quin-Coco manufactured both at St. Louis and Philadelphia for the year 1915 is less than $15,000.

A. Based on the manufacturing records, it would be less than $15,000.

Examination closed.

HARRY E. JAMES.

GEORGE A. HAFFA, a witness called in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

538 A. George A. Haffa; 52; 730 North 20th Street, Philadelphia; druggist. I am in the employ of William R. Warner & Company and have been continuously in their employ since December 15, 1876.

Q. 2. Since 1908, what has been your department of the work of William R. Warner & Company of Philadelphia?

A. I am manager of the Pill Department, Catalogues, Circulars, Labels and Cartons, etc. Anything relating to printing.

Q. 3. Have you had anything to do with the printing and circulation of the "Salesman's Confidential" during that time?

A. Yes, that goes in the catalogue.

Q. 4. Can you produce a copy of the "Salesman's Confidential" for the year 1911-1912, and state when it was completed and issued to the salesmen?

A. June, 1911. I produce a copy of it.

Q. 5. State if this copy contains information as to "What a salesman should know," "The Salesman's Creed," and "Our Policy in Dealing with the Trade briefly stated."

Mr. Bradford: Objected to as incompetent. The book itself is the only competent evidence on this point.

A. Yes, at pages 59 and 60.

Q. 6. State whether or not this information as to "What a Salesman Should Know" and the Creed and the Policy have been contained in all the subsequent issues of the "Salesman's Confidential" circulated amongst your salesmen?

A. It was the first time the Creed appeared in this 1911-1912 issue, and it has appeared in all subsequenut issues.

Q. 7. State whether or not printed copies of the "Salesman's Creed" were previously to June, 1911, circulated among your salesmen, and if so, when?

A. The Fall of 1910.

539 Q. 8. Can you produce a copy?

A. I do.

Q. 9. Do you know whether or not copies of the printed Creed which you have just produced were sent out to your various salesmen in the Fall of 1910?

A. They were sent out in November, 1910.

Mr. Rawle: Counsel for defendant offers in evidence "Salesman's Confidential" of 1911-1912, and the same is marked "Defendant's Exhibit, Salesman's Confidential, 1911-1912."

Counsel for defendant offers in evidence the Printed Creed produced by the witness which is marked "Defendant's Exhibit, Salesman's Creed, 1910."

Q. 10. State whether or not you have knowledge as to whether William R. Warner & Company, during your connection with it, marketed quinine tablets, and if so, produce a box.

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. Yes, sir, we did. I produce a box. It is labeled "Tasteless Quinine Tablets of quinine and chocolate. Each tablet contains Tannate of Quinine, one grain prepared for the Medical Profession Specially by William R. Warner & Company. Philadelphia, New York, Chicago, London."

Q. 11. State when this was first marketed, or the earliest date you can remember when it was marketed by your house.

Mr. Bradford: Same objection.

A. 1895, I would say.

Q. 12. Has it been marketed ever since and is it now marketed?

Mr. Bradford: Same objection.

540 A. It is now marketed and has been.

Q. 13. Will you state whether or not these tablets contain chocolate?

Mr. Bradford: Same objection.

A. Yes, sir, they do.

Q. 14. State whether or not these tablets have been continuously listed by your house

Mr. Bradford: Same objection.

A. They have.

Mr. Rawle: The box of quinine tablets produced by the witness is offered in evidence and is marked "Defendant's Exhibit, Warner Quinine Tablets."

Mr. Bradford: Same objection to the offer of the exhibit.

Q. 15. I hand you two preparations produced by E. A. Pfeiffer, when testifying, the first is marked as containing "Simple Syrup, containing 2 gr's of Quinine Sulphate to each 90 min's." The second is marked "Coco Syrup containing 2 gr's of Quinine Sulphate to each 90 minims." Please open and taste the contents of each of these bottles and compare their taste in respect of their bitterness.

Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

(Witness takes the bottles, shakes up the preparations, removes the corks as requested by counsel for defendant, tastes first the white bottle, and then after rinsing out his mouth, tastes the dark bottle and then answers as follows):

A. I would say the one with chocolate tastes the less bitter.

Q. 16. I hand you a bottle marked "Quinitol, Pitman-Moore Co., Chemists, Indianapolis, Indiana," and stated on the label to
541 contain Calisaya Alkaloids, which is the preparation referred to by the plaintiff's witness, Thorborn, in answer to X Q. 20, P. R. (plaintiff's record) p. 52. Please open this bottle and taste it and state whether or not it is bitter.

Mr. Bradford: Same objection.

(Witness shakes preparation, takes cork from bottle and tastes contents and answers as follows):

A. It is bitter, all right.

(The bottle referred to is marked "Quinitol, Calisaya. Pitman-Moore Co.").

Q. 17. State how its degree of bitterness compares with the bitterness of the other two bottles which you have just previously tasted, or either of them.

A. I get it in the back of the throat, the bitterness. It is much more bitter than either.

Mr. Rawle: Counsel for defendant offers in evidence the two bottles previously referred to by the witness which he tasted, the brown bottle marked as containing Coco Syrup is marked "Defendant's Exhibit Pfeiffer Experiment No. 1," and the white bottle marked "Simple Syrup," which he tasted, is marked "Defendant's Exhibit Pfeiffer Experiment No. 2." The bottle of Quinitol produced by the witness and tasted, is offered in evidence and marked "Quinitol, Pitman-Moore Co."

Q. 18. I hand you a bot-le marked "Syrup Choava Comp., C. B. Smith & Co." Please open this bottle, taste the contents and state whether or not you can detect chocolate.

(Witness shakes bottle, opens, tastes and answers as follows):

A. Yes.

Mr. Rawle: Defendant's counsel offers in evidence the
542 bottle just produced and the same is marked "Defendant's Exhibit Syrup Choava Comp."

Mr. Bradford: Exhibit objected to as incompetent, irrelevant and immaterial.

Cross-examination.

By Mr. Bradford:

X Q. 1. Can you tell us who was the author of this Salesman's Creed as appears on the 1910 card?

A. No, except by the information which I find in the "Salesman's Confidential," which is produced by me for 1911-1912, on page 60, I find that it is printed "By courtesy of Sheldon University Press, Libertyville, Ill."

GEORGE A. HAFFA.

THEODORE K. BOESCH, a witness produced in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation.

A. Theodore K. Boesch; 36 years old; Oak Lane, Philadelphia; druggist.

Q. 2. Are you a registered druggist and how long have you been, and how long have you been at your present place?

A. Yes. I have been registered 16 years and in business in Oak Lane for 6 years.

Q. 3. Is this a suburb of Philadelphia?

A. Yes.

Q. 4. You have a general prescription practice as well as a custom practice over the counter?

A. Yes.

Q. 5. How considerable a stock of medical preparations do you have in stock?

A. A good stock.

543 Q. 6. Please give a list of preparations you have in stock and of which you carry preparations of other manufacturers which are of similar composition and which might be used interchangeably?

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. I have prepared this list from my stock, which I produce, which is as follows:

Name.	Number of other makes.
Malt Ext. & Cod Liver Oil	Two.
Ess. of Pepsin (Fairchild)	One.
Milk of Magnesia (Phillips)	One.
Aromatic Cascara (P. D. & Co.)	Three.
Listerin	Three.
Liquid Peptenzyne (Reed & Carnick)	One.
Hayden's Viburnum Comp.	Two.
Phospho Muriate of Quinine	One.
Lloyd's Hydrastis Colorless	Two.
Elixir Lacto Peptin	One.
Milk of Bismuth (P. D. & Co.)	Two.
Bromidia	One.
Lysol	One.
Cresolin (Pearson)	One.
Petrogen	One.
Taka Diastase	One.
Adrenalin	One.
Elixir Pepsin	Two.
Wine of Cod Liver Oil & Hypo-Phosphites	Two.
Horsford's Acid Phosphate	One.
Elixir Hydrate and Codeine	One.
Glyco Heroin	One.
Antiphlogistine	Two.
Resinol	One.
Peacock's Bromides	One.
Peptomangan Gude	Three.
Fat Free Tinc. of Digitalis	One.
Analgesique (Baume)	One.
Aristol	One.
544 Urotropin	Five.
Argyrol	Two.
Codeine Phosphate	One.
Antikamnia	One.
Phenacetine	One.
Iron Peptonized (Merck)	One.
Heroin	One.
Protargol	One.
Sulphonal	One.
Trional	One.
Dionin	One.
Sugar of Milk	Two.
Sodium Bicarbonate	Two.
Apiloine (Chapateaut)	One.
Urotropin	Two.
Bulgaria Tablets	Three.
Colchi Sal	One.
Kunkle's Cascara Cathartic	One.
Aloin Belladonna & Strychnine (Sharp & Dohme)	Two.
Alophen	Two.
Quinine Zinc & Iron Valerianate	Two.
Blaud Pills	Three.

In the first column of this list *is* the names of the preparations, in the second column those of other makes, the number of other makes, in addition to the make that is noted in the first column.

Q. 7. That is you have in any given case a preparation of the name noted in the first column and the word "Two" in the second column means you have a similar preparation to the one in the first column made by two other different houses.

A. Yes, sir.

Q. 8. Has this list been corrected as to spelling?

A. Yes, sir; it is complete.

Q. 9. State whether or not a druggist can successfully push
545 the sale of any medicinal preparation he may choose, if it is a good article, and if so, by what methods can he create a market for such preparation?

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. He would create a market through his physicians as well as through the patrons who come into the store.

Q. 10. Have you ever done that yourself?

Mr. Bradford: Same objection.

A. Yes.

Q. 11. With what success in some instances?

Mr. Bradford: Same objection.

A. Generally successful.

Q. 12. Is that common in the retail drug trade?

Mr. Bradford: Same objection.

A. Generally advocated.

Q. 13. Generally done by retail druggists?

Mr. Bradford: Same objection.

A. Yes.

Cross-examination.

By Mr. Bradford:

X Q. 1. In this list of preparations which you have given, what does the name in the first column signify?

A. I have used that name because it is one that has been copyrighted or in which the proprietor has a proprietary right.

X Q. 2. Is this true in respect, for example, of Arromatic Cascara?

A. Well, not in which the legal rights are defined. The moral rights, or rather the general thought, is that one manufacturer in the case of Cascara, introduced it to the general market.

X Q. 3. The name then in the first column is the name by which the preparation was originally introduced, so far as you know?

A. Yes.

546 X Q. 4. Do you carry in your stock Coco-Quinine?

A. Yes.

X Q. 5. How long have you known of this preparation?

A. Well, six years, I would say.

Redirect examination.

By Mr. Rawle:

R. D. Q. 1. Have you had any experience in your store of prescriptions calling for quinine sulphate and chocolate in powdered form?

Mr. Bradford: Objected to as immaterial, irrelevant, incompetent and not redirect examination.

A. My answer would be, yes.

R. D. Q. 2. Please explain what these prescriptions write.

Mr. Bradford: Same objection.

A. Quinine Sulphate, specific quantities; chocolate powdered, sugar, those of specific quantities.

R. D. Q. 3. For how many years have you known of such prescriptions?

Mr. Bradford: Same objection.

A. About 17 years.

R. D. Q. 4. What is the purpose of chocolate in these prescriptions?

Mr. Bradford: Same objection.

A. To disguise.

R. D. Q. 5. How long have you been in the drug business?

A. 22 years, of which I have been registered 16.

Recross-examination.

By Mr. Bradford:

R. X Q. 1. Did you ever take any quinine sulphate in chocolate without other taste-disguising agents?

547 A. No.

R. X Q. 2. Did you ever taste it?

A. Yes.

R. X Q. 3. What can you say in reference to its taste?

A. Well, if I may ask, I would like you to qualify as to whether it is in a powdered or liquid form.

R. X Q. 4. In either.

A. Well, the taste in liquid form is much more pleasant than powdered. I don't think there is much disguise in the powdered form. It is a question of taste, however. We use it frequently.

THEODORE KARL BOESCH.

Mr. Rawle: Defendant's counsel offers in evidence a bottle marked "Cocoa and Quinine, Masengill Bros., Bristol, Tenn." and asks that the same be marked "Defendant's Exhibit, Cocoa Quinine, Masengill."

Mr. Bradford: The exhibit and any evidence based thereon is objected to as incompetent, immaterial and irrelevant.

Mr. Rawle: Defendant's counsel also offers in evidence a bottle marked "Kwin Koko, Sutliff and Case Co., Peoria, Ill."

Mr. Bradford: Same objection.

Mr. Rawle: Defendant's counsel also offers in evidence bottle marked "Palatable Syrup, Cocoa and Quinine," manufactured by American Druggists Syndicate of Greater New York.

Mr. Bradford: Same objection.

Mr. Rawle: Defendant's counsel also offers in evidence a paper box containing tablets marked as follows: "Quinine Chocolates,
548 manufactured by Caswell-Massey & Company, Ltd., marked "Defendant's Exhibit, Quinine Chocolates, Caswell."

Mr. Bradford: Same objection.

Mr. Rawle: Counsel refers in respect to the last offer to the testimony of G. M. Beringer, in relation to Chocolate Quinine Tablets.

Mr. Rawle, desiring to prove the date at which the preparations of the four houses he is about to mention were first put out by them, samples of which preparations were offered in evidence while G. A. Pfeiffer was on the stand, and in order to save expense, has obtained a letter from G. F. Harvey & Company, of Saratoga Springs, New York, stating that his house had first put out their preparation in December, 1909, and offers this evid-nce as proof of that fact.

Also letter from the First Texas Chemical Manufacturing Company stating that their preparation was first made in 1910 and had been supplied regularly since.

Also a letter from Masengill Bros. Company, stating that they had been making and supplying their preparations since January 7, 1911, and had continually supplied it since.

Also letter from Henry S. Wampole & Co., of Baltimore, stating that they had first put out their preparation on the market about January 1, 1912, and had been supplying it regularly since.

Mr. Bradford: Counsel for plaintiff, without questioning the correctness of the dates thus sought to be proven, objects to the evidence as he has heretofore objected to the exhibits, as having no value to prove any issue in this case and as incompetent, irrelevant and immaterial.

Mr. Rawle: Defendant's counsel offers in evidence a periodical called "The N. A. R. D. Journal," stated to be "The Official
549 Organ of the National Association of Retail Druggists," being the number of January 20, 1916, and specifically a formula for "Syrup of Quinine," appearing on page 763 thereof. The article is as follows:

"Syrup of Quinine.

It has long been a mystery to many pharmacists how a palatable syrup of quinine may be prepared. The following formula makes this extremely simple and produces an elegant preparation, and is one that every physician should be told about:

Quinine, alkaloid	480 grains.
Chloroform water	4 drams.
Mucilage of acacia	1 ounce.
Chocolate syrup	enough to make 32 ounces.

The quinine is triturated with a mixture containing the chloroform water, mucilage of acacia (fresh), and four ounces of chocolate syrup; then the balance of the chocolate syrup is added.

This preparation must be well shaken before it is dispensed, and bottles containing it should have a 'shake' label attached. It keeps well, but as a proper precaution, the quantity required should be anticipated for only about one month. As it is readily prepared, it may as a rule, be prepared extemporaneously. Some physicians have shown a liking for quinine tannate in this preparation, in place of the alkaloid, as the tannate being less soluble is more palatable, yet the great majority favor the above formula and seem to get better results from its administration than they do from a preparation containing the tannate. The use of 8 ounces of aromatic syrup of yerba santa to replace some of the chocolate syrup, is sometimes advisable.

The chocolate syrup for the syrup of quinine is prepared as follows, the amounts given making one gallon of the syrup:

550	Chocolate	8 ounces.
	Sugar	6 pounds.
Water, hot		3½ pints.
Tincture of Vanilla		1 ounce.

Rub the chocolate to a smooth paste with eight ounces of hot water; then gradually add the balance of the water, place on a "slow" fire and allow to simmer for five minutes; then add the sugar, bring to a boil, and allow to simmer for at least thirty minutes; then remove from the fire. Strain while still hot through a well wetted muslin strainer, and when cold, add the tincture of vanilla, and mix thoroughly by agitation.

It is essential that chocolate syrup be allowed to remain at the boiling point (simmering) for at least thirty minutes, that the full flavor of the chocolate may be developed. Neglect of this precaution will result in a poorly flavored chocolate syrup and is probably the reason why some pharmacists dispense an unsatisfactory chocolate beverage at the fountain."

Mr. Bradford: The introduction of the exhibit and all evidence based thereon is objected to as wholly without value to prove any issue in this case and as immaterial, irrelevant and incompetent.

Mr. Rawle: Counsel for defendant calls upon counsel for plaintiff to produce a copy of a letter from J. K. Lilly to G. A. Pfeiffer, or William R. Warner & Company, dated September 16, 1912. Also the original of a letter, a copy of which counsel holds in his hand, from G. A. Pfeiffer to J. K. Lilly, dated September 30, 1912. Mr. Rawle states that the original letter of September 16, 1912, was received by Mr. Pfeiffer when he was out of town and temporarily residing in Chicago, and has been mislaid and cannot be found after diligent search.

551 Mr. Bradford: Counsel for plaintiff responds that so far as the copy of the letter dated September 30, 1912, to J. K. Lilly and admitted by counsel for defendant to have been written by G. A. Pfeiffer, although unsigned, is concerned, he makes no objection. As to the letter alleged to have been written by J. K. Lilly to G. A. Pfeiffer, dated September 16, 1912, copy of same is not in his possession and a search for the same in the office of Eli Lilly & Company has failed to discover it, it evidently having gone the same way as the original.

Mr. Rawle: Defendant's counsel offers in evidence the copy of the letter from G. A. Pfeiffer to J. K. Lilly, dated September 30, 1912, which is as follows:

"9-30-12.

Mr. J. K. Lilly,
c-o Eli Lilly & Co.

DEAR MR. LILLY:

Your letter of the 16th, was forwarded to the writer in Chicago, for attention, in reply we appreciate your letter very much, as it enables us to correct the wrong impression which you hold, as we supply no goods under the name of Gobson, Howell Co. This is a name used by H. K. Wampole & Co., to market a line of products they manufacture. The party advising you that Wm. R. Warner & Co. marketed this line, evidently desired to poison your mind, for he did or should have known that this name has been used for years by H. K. Wampole & Co., and nearly everyone familiar in the trade knows this fact.

Regarding the Homilia spirit, I will advise frankly that while my firm are non-members they have endeavored and I believe, (not without success) to avoid all unfair competition, not only in
552 their products, but in the management of their business, and the hiring of their salesmen. The only controversy we have any record of was with your firm regarding marketing of a preparation similar to your Coco-Quinine. This preparation was marketed not only before we were members of the Homilia Club, but before the Homilia Club was organized, and under the rules adopted at the organization was like all preparations on the market prior to such organization specifically exempted. Your principal objections are the name and price of this product. Neither of which we felt justified in changing.

By referring to your catalogue #35, page 153, you will note your list on Elixir of Salicylic Acid, Lilly is higher than Elixir

Salicylic Acid Compound. Formerly this was not the case, b
when prices were revised several years ago, your cost departme
evidently found it necessary to advance the price of Elixir Salicyl
Acid, Lilly. Surely the cost of Elixir Salicylic Acid Compou
also justified an advance. However this preparation was either n
at all or only slightly advanced. To us there seems only one reas
for not advancing the list, now that Elixir Salicylic Acid Compoun
is your replacer for Wm. R. Warner Co.'s Elixir Salicylic Compoun
Regarding the name, we believe an Impartial Jury would adm
that the name Elixir Salicylic Acid Compound is as near or near
to Elixir Salicylic Compound than is the name of Quin-Coco to Co
Quinine.

Further records prove your sales department has not without su
cess approached salesmen of ours and our affiliated companies,
much so that in Philadelphia we have called Eli Lilly & Co
Salesmen Department Bureau, and investigation on your part wi
prove that your firm have hired salesmen of ours from the Atlant
to the Pacific. We mention this not to criticise your action
553 (for we give you the right to be arbiter of your business
but for the reason that you have brought up the subject, an
because in our opinion the Homilia spirit lacks the essence and do
not influence a member to do right and avoid unfair competitio
because it is right and it is unfair, but because it happens to be th
selfish interest of that member or all the members to act accordingl
I have take the liberty of writing you frankly, believing tha
you would prefer such a statement of our position.

Truly yours,"

MC. —— ——.

Defendant's counsel further calls upon plaintiff's counsel to inst
tute a further search for a copy of the letter from J. K. Lilly to G.
Pfeiffer or Wm. R. Warner & Company of September 16, 1912, an
reserves the right to offer the same in evidence if produced.

Mr. Bradford: Counsel for plaintiff agrees that he will have such
search instituted for the copy of the letter stated and calls upo
counsel for defendant to have a further careful search instituted fo
the original letter, being entirely willing to have the same made
part of the record in this case.

Mr. Rawle: Defendant's counsel asks plaintiff's counsel if he
willing to furnish to defendant's counsel, to be introduced as evi
dence in this case, a statement showing the territory of each of th
Lilly salesmen within the general line comprehended between Sagi
naw, Michigan, on the north, and the Gulf of Mexico, extendin
east to cover Virginia and the States south, and extending west t
cover the States of Texas and Arkansas, together with the name of th
particular salesman employed in each of said territories during th
last two years.

554 Mr. Bradford: Counsel for plaintiff replies that withou
knowing the purpose for which this information is desire
or what possible value it can have in this case, he is not willing t
make such an agreement. If counsel for defendant will make an

good reason for this information appear on the record, it will be cheerfully given.

Mr. Rawle: Defendant's counsel wishes to avail himself of the information asked for in order to make full and complete the testimony of various salesmen hitherto called as witnesses for plaintiff, in the section of the United States referred to, desiring to have the complete statement instead of the partial statement that has already appeared on the record as the succeeding salesmen were called as witnesses and stated their names and territories.

Mr. Bradford: Counsel for plaintiff replies that as to the plaintiff's salesmen who have appeared as witnesses, the territory served by each is already on record in this case and at this time he cannot see that the names of other salesmen and the territories covered by them is of any materiality in this case.

HENRY C. BLAIR, a witness produced in behalf of defendant, having been duly sworn, was examined and testified as follows:

Q. 1. State your name, age, residence and occupation.

A. Henry C. Blair; 46; residence 800 Walnut St., Philadelphia; retail druggist. I have been in the retail druggist business at that place since 1887, and my father was there before me. I have been a registered pharmacist since 1892. I graduated from the Philadelphia College of Pharmacy in 1892.

Q. 2. State whether or not you carry in stock in your drug
555 store any medicinal preparations as to the items of which you have a similar preparation made by more than a single manufacturer?

Mr. Bradford: Objected to as immaterial, incompetent and irrelevant.

A. Yes, sir.

Q. 3. Can you give an approximate amount of the number of such items which you carry in duplicate or triplicate or quadruplicate?

Mr. Bradford: Same objection.

A. We probably have a hundred such preparations, and we have twelve or more which we are using constantly.

Q. 4. Will you state whether or not any of these are what are known as proprietary preparations or specialities?

Mr. Bradford: Same objection.

A. That is what I had reference to. Special preparations.

Q. 5. Can you state approximately how many standard drugs or preparations are put out by two or more houses?

Mr. Bradford: Same objection.

A. Including the galenicals and tablets and such things as that, there are probably a thousand. I mean such things as the druggist would prepare himself of an ethical kind. I think the word galen-

ical is derived from the name of Galen, but I am not positive of that.

Q. 6. Will you state whether or not these drugs you said were similar can be said to be interchangeable, and if so, in what sense.

Mr. Bradford: Same objection.

A. Nearly all of these would be interchangeable providing the pharmacist is not a man of integrity. If he is, they are not interchangeable.

Q. 7. Are there drugs or preparations one of which could
556 be used for the other without the patient or the prescribing physician finding it out?

Mr. Bradford: Same objection.

A. Yes, that is true of nearly all of these preparations. A druggist who is in business simply for profit and has no conscience could substitute one of these things for the other without the patient or the doctor knowing of the substitution. That is probable, not positive.

Q. 8. Upon whom then does the use of the proper things depend?

Mr. Bradford: Same objection.

A. Upon the retail pharmacists.

Q. 9. Is there an authoritative code of ethics in the retail pharmacy business?

A. Yes, sir; there is a code of ethics made by the American Pharmaceutical Association. I don't think that is generally known to pharmacists, though. It was made over 50 years ago. I wouldn't say how long. I think it was in 1850, somewhere along there.

Q. 10. Have you seen it?

A. Yes, sir.

Q. 11. Will you state whether or not it is of a high standard?

A. Very high; yes, sir.

Q. 12. Do you know to what extent it has been circulated?

A. No, sir; I do not. I can say that every member of that Association is supposed to live up to the ethical code.

Q. 13. State whether or not your drug store has sold tablets called "Yerba-Chocolates," and if so, when, and produce a box.

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. We have sold these "Yerba-Chocolates" since the Cen-
557 tennial Exposition here in 1876, and I cannot say how much before that time.

Q. 14. State whether or not you have continuously offered them for sale.

Mr. Bradford: Same objection.

A. We have continuously offered them for sale ever since and are offering them now.

Q. 15. State whether or not these tablets contain some form of quinine, also chocolate and Yerba Santa.

Mr. Bradford: Same objection.

A. Yes, sir.

Mr. Rawle: The box produced by the witness is offered in evidence and marked "Defendant's Exhibit, Blair Tablets."
Mr. Bradford: Exhibit and offer objected to.

Q. 16. State whether or not you have ever had occasion to prepare or see prepared in your store a liquid preparation of chocolate and quinine, and if so when and for whom?
A. I remember shortly after the time of my graduation from Philadelphia College of Pharmacy, making up such a preparation for Dr. Samuel K. Ashton, who had his office just below our store and who got his suggestion about such things from us.
Q. 17. State whether or not you compounded this mixture on Dr. Ashton's prescription.
A. Yes, sir.
Q. 18. What did you put in?
A. Chocolate and Yerba Santa and quinine in a syrupy mixture.
Q. 19. Will you state whether the preparation was liquid?
A. Yes, sir.
Q. 20. Give the date, if you please.
A. I cannot give the date, but I will say prior to 1895.
558 Q. 21. State whether or not a retail druggist can, if he so chooses, push a medicinal article, if it is a good one, and create a demand or market for it?

Mr. Bradford: Objected to as incompetent, irrelevant and immaterial.

A. Yes.
Q. 22. Referring to the code of ethics, or your own code, will you state whether or not doing so is considered ethical in the druggist business?
A. Yes, providing it is done in an ethical way.
Q. 23. Can it be done in an ethical way?

Mr. Bradford: Same objection.

A. I can't answer that question by saying "Yes" or "No." If the preparation is an ethical preparation, then it can be pushed in an ethical way.

Cross-examination.

By Mr. Bradford:

X Q. 1. Did Dr. Ashton's order for this preparation come in the form of a prescription?
A. That I cannot say. I should think that it did not.
X Q. 2. Was it used by a patient?
A. That I cannot say.

X Q. 3. How much of it did you make up?
A. As I remember, about four ounces.

HENRY C. BLAIR.

Examination closed.

Mr. Rawle: It is stipulated by counsel for the respective parties that C. B. Smith, of the firm of C. B. Smith & Co., 863 Broad Street, Newark, New Jersey, would, if called as a witness, testify in behalf of defendant that his house had manufactured and marketed
559 for some years prior to 1900 a preparation called "Syrup Choava Comp.", a bottle of which has been offered in evidence today on behalf of defendant. That this preparation contains, among other ingredients, chocolate or cocoa, and is intended to be used as a vehicle for the administration of doses of quinine for the purpose of disguising the bitter taste of the quinine, and the same way with other bitter drugs. It contains no quinine itself.

Counsel for defendant states that the information as to the period at which this preparation was first put out was communicated to his client in writing by Mr. Smith.

(Here follow defendant's exhibits marked pages 560 and 561.)

DEFENDANT'S EXHIBIT, G. A. PFEIFFER'S LIST OF LILLY PRODUCTS.

(Offered page 21 of D. R.)

List of preparations listed in Eli Lilly's 1913-14 Catalogue which are similar to those of other manufacturers and marketed by Eli Lilly & Co. subsequent to introduction of original product.

Original	Manufacturer	Cat. p. No.	Lilly's Product's Name.
Albolene	McKesson & Robbins	218	Petronol, Lilly
Analgesine	H. K. Mulford & Co.	192	Analgesic Balm
Angiers Emulsion	Angier Chem. Co.	203	Emulsion Petroleum Hypophosphites
Antiphlogistine	Denver Chemical Co.	217	Osmosum, Lilly
Arsenauro	Parmele Pharmacal Co.		Gold & Arsenic Bromides
Bromidia	Battle & Co.	225	Sol. Bromides Comp.
Calenduline	Calenduline Co.	206	Glycerole Calendula
Calolactose	Searle & Hereth	221	Calomel & Bismuth Powder
Campho Phenique	Campho Phenique Chem Co.	218	Phenolated Camphor
Creo Terpin	H. K. Wampole Co.	152	Elix. Creosote & Terpin Hydrate Comp.
Castoria	Centaur Co.	167	Laxative Carminative
Comp. Digestive Powd.	Searle & Hereth	221	Digestive Comp. Lilly Pd.
Eczemacide	Searle & Hereth	199	Eczema Lotion, Lilly
Elix. Femella	Searle & Hereth	204	Femagen, Lilly
Elix. Salicylic Comp.	Wm. R. Warner & Co.	161	Elix. Salicylic Acid Comp.

turers and marketed by Eli Lilly & Co. subsequent to introduction of original product.

Original	Manufacturer	Cat. p. No.	Lilly's Product's Name.
Albolene	McKesson & Robbins	218	Petronol, Lilly
Analgesine	H. K. Mulford & Co.	192	Analgesic Balm
Angiers Emulsion	Angier Chem. Co.	203	Emulsion Petroleum Hypophosphites
Antiphlogistine	Denver Chemical Co.	217	Osmosum, Lilly
Arsenauro	Parmele Pharmacal Co.		Gold & Arsenic Bromides
Bromidia	Battle & Co.	225	Sol. Bromides Comp.
Calenduline	Calenduline Co.	206	Glycerole Calendula
Calolactose	Searle & Hereth	221	Calomel & Bismuth Powder
Campho Phenique	Campho Phenique Chem Co.	218	Phenolated Camphor
Creo Terpin	H. K. Wampole Co.	152	Elix. Creosote & Terpin Hydrate Comp.
Castoria	Centaur Co.	167	Laxative Carminative
Comp. Digestive Powd.	Searle & Hereth	221	Digestive Comp. Lilly Pd.
Eczemacide	Searle & Hereth	199	Eczema Lotion, Lilly
Elix. Femella	Searle & Hereth	204	Femagen, Lilly
Elix. Salicylic Comp. Warner	Wm. R. Warner & Co.	161	Elix. Salicylic Acid Comp.
Ess. Pepsin, Fairchild	Fairchild Bros. & Foster	203	Ess. Pepsin, Lilly
Glyco-Heroin (Smith)	Martin H. Smith & Co.	206	Glycerole Heroin Comp.
Glyco-Thymoline	Kress & Owen Co.	210	Alkaline Antisep Lilly
Grays Glycerine Tonic	Purdue Frederick Co.	207	Glycero-Tonic Comp. Lilly
Guaiatonic	Searle & Hereth	207	Guaiacol Comp. Lilly
Fellows Hypophosphites	Fellows & Co.	166	Syr. Hypophos. Comp. Cloudy
Hires Root Beer Ext.	Chas E. Hires Co.	224	Root Beer Extract
Lactopeptine	N. Y. Pharm. Asso.	202	Lactated Pepsin Elix.
Listerine	Lambert Pharm. Co.	204	Eucalyptus Thymol
Liq. Peptonoids	Arlington Chem. Co.	211	Peptones Formulas
Liq. Peptonoids with Creosote & Guaiacol	Arlington Chem. Co.	211	Peptones with Creosote
Maltine Combinations		213	Malt Ext. Preps.
Milk of Magnesia	Phillips	214	Milk of Magnesia, Lilly
Passifloria	Jno. B. Daniel	217	Passolaria, Lilly
Pepto Mangan "Gude"	G. M. J. Breitenbach Co.	226	Sol. Iron Pep & Mang Comp.
Pil Casc. Cath. Hinkle	Wm. R. Warner & Co.	39	Pil Casc. Hinkle
Resinol	Resinol Chem. Co.	215	Resinol Co., Lilly
Syr. Tolu & Heroin Co.	Wm. R. Warner & Co.	168	Syr. Tolu Comp.
Taka Diastase Liq.	Parke Davis & Co.	210	Liq. Diastase, Lilly
Tr. Digitalis Fat Free	Searle & Hereth	235	Tr. Digitalis Fat Free, Lilly
Tritica S & H	Searle & Hereth	212	Tritici, Lilly
Wine of Ext. of Cod Liver Oil w/ Malt & Hypophos.	H. K. Wampole Co.	195	Cloetonic

DEFENDANT'S EXHIBIT "SALESMAN'S CREED 1910".

(Offered page 539 of D. R.)

The Salesman's Creed

To respect my profession, my company, and myself. To be honest and fair with my company, as I expect my company to be honest and fair with me; to think of it with loyalty, speak of it with praise, and act always as a trustworthy custodian of its good name. To be a man whose word carries weight at my home office; to be a booster, not a knocker; a pusher not a kicker; a motor, not a clog.

To base my expectations of reward on a solid foundation of service rendered; to be willing to pay the price of success in honest effort. To look upon my work as opportunity, to be seized with joy and made most of, and not as painful drudgery to be reluctantly endured.

To remember that success lies within myself, in my own brain, my own ambition, my own courage and determination. To expect difficulties and force my way through them; to turn hard experience into capital for future struggles.

To believe in my proposition heart and soul; to carry an air of optimism into the presence of possible customers; to dispel ill temper with cheerfulness, kill doubts with strong convictions, and reduce active friction with an agreeable personality.

To make a study of my business or line; to know my profession in every detail from the ground up; to mix brains with my efforts and use system and method in my work. To find time to do everything needful by never letting time find me doing nothing. To hoard days as a miser hoards dollars; to make every hour bring me dividends in commissions, increased knowledge or healthful recreation.

To keep my future unmortgaged with debt; to save money as well as earn it; to cut out expensive amusements until I can afford them; to steer clear of dissipation and guard my health of body and peace of mind as my most precious stock in trade.

FINALLY, to take a good grip on the joy of life; to play the game like a gentleman; to fight against nothing so hard as my own weakness, and to endeavor to grow as a salesman and as a man with the passage of every day of time.

THIS IS MY CREED

There is so much good in the worst of us
And so much bad in the best of us;
That it behooves each one of us
To say naught about the rest of us.

Wm. R. Warner & Co., Philadelphia and St. Louis

562 In the District Court of the United States, Eastern District of Pennsylvania, December Term, 1914.

In Equity.

No. 1355.

THE ELI LILLY COMPANY

vs.

WM. R. WARNER & COMPANY.

Amendments to Answer.

Filed May 10, 1916.

And now, this tenth day of May, 1916, Francis Rawle, Esq., for defendant, moves for leave to file as of August 20, 1915, the following amendments to the answer and the following answer to the amendment of the bill of complaint, paragraph 9.

Cancel paragraph 2 of the answer and substitute the following in lieu thereof:

2. Defendant has no exact knowledge as to when the plaintiff began the manufacture and sale of "Coco-Quinine." It denies that at the time when the plaintiff became such manufacturer, no similar product was known either to the drug trade or to the medical profession; it avers that at that time there were on the market preparations intended to be used as vehicles for administering quinine and dis-

guising its bitter taste containing chocolate or cocoa and quinine, and that for many years before 1899 the mixing of chocolate or cocoa with
563 quinine for the purpose of disguising the bitter taste of quinine and making a palatable medicine, in liquid, tablet or powdered form, had been known to many druggists and physicians and had been set forth in various pharmaceutical and medical journals and works, and that long before 1899 chocolate and cocoa were often used to mask the taste of drugs and to make a palatable preparation.

Cancel the last paragraph of clause 12 of the Answer to the Bill, and substitute the following:

And the defendant, for a further defense to the Bill of Complaint, says that it has since about January 1st, 1909, and that The Searle & Hereth Company has from some time in the year 1906 to about January 1st, 1909, openly sold the produce "Quin-Coco" to the trade, and that this has been at all times substantially known to the plaintiff from those dates until the filing of the Bill of Complaint and that the plaintiff by its conduct in the matter has been guilty of laches and has thereby forfeited any equitable rights which it may have had in the premises.

Answer to the Amendment of Paragraph 9 of the Bill of Complain

9. It is admitted that the parties owning the Pfeiffer Chemic Company took over the capital stock of The Searle & Hereth Co pany and the two companies then passed under the same manag ment in the fall of 1906, and that the laboratories of the latt Company were moved to the laboratories of the former compan at St. Louis. But it averred that the defendant had no conne tion of any kind with these transactions. It is denied that th Pfeiffer Chemical Company, before its connection with The Sear & Hereth Company, had carried on experiments for the purpose duplicating or imitating plaintiff's Coco-Quinine or had endeavore to make any product in imitation of plaintiff's Coco-Quinine, e cept as its right was. It is denied that Quin-Coco as distribute by defendant to its trade is or ever has been inferior to plain
564 tiff's product Coco-Quinine in stability or in any other re spect. It is admitted that Quin-Coco was at one time sol by Pfeiffer Chemical Company as distributing agents under the labe of The Searle & Hereth Company, but the defendant says that a averments contained in this paragraph of the bill in reference t any acts of The Searle & Hereth Company or Pfeiffer Chemic Company prior to August, 1908, in any way affect the rights of th defendant company which, until the time above to be referred t had no connection of any kind with either of the other above men tioned companies.

It is admitted that in the summer of 1908, certain persons owning the Pfeiffer Chemical Company bought the capital stock of Wi liam R. Warner & Company, defendant, and that the same officers practically manage and have since managed the affairs of all o these companies.

It is denied that the officers of any of these companies undertook the manufacture of any product; it is admitted that the defendant has been since the summer of 1908 the sole distributor of Quin-Coco It is denied that any manufacture as undertaken in defendant laboratories to put out a substitute for plaintiff's Coco-Quinine and that any experiments were made by defendant that were unsuc cessful.

It is averred that after these three companies became associated Quin-Coco was made at the Philadelphia laboratories of The Searle & Hereth Company, and was distributed to the trade by defendant under Searle & Hereth labels.

It is denied that renewed or any efforts were then made or have been made by defendant to push Quin-Coco in the drug trade and medical profession as a substitute for plaintiff's Coco-Quinine except in a fair and lawful competitive sence as defendant's right was and is.

It is denied that The Searle & Hereth Company is no
565 longer an active manufacturing company and is merged into the business of the Pfeiffer Chemical Company. It is denied that Quin-Coco is manufactured by Pfeiffer Chemical Company

by defendant; it is manufactured by The Searle & Hereth Company at its St. Louis and Philadelphia laboratories. It is admitted that the three corporations are largely owned by the same persons and are practically managed, and have been since August, 1908, by the same officers. It is admitted that defendant is the distributor of Quin-Coco and that it is labelled Quin-Coco with the name of The Searle & Hereth Company as the manufacturer, in accordance with the fact.

It is denied that the defendant, since the time averred in the bill or at any other time, by many and divers ways and schemes or otherwise, in placing its said product on the market, has represented through its agents and salesmen or otherwise in any manner to purchasing druggists and physicians or to any person or persons that its said product could be furnished in lieu of, or for, plaintiff's product Coco-Quinine when called for by customers or by physicians' prescriptions.

It is denied that druggists have, or that any druggist has, as averred in this paragraph, received any instructions from defendant as to selling 'Quin-Coco" for plaintiff's "Coco-Quinine," when the latter is called for. The defendant has no knowledge or information that druggists have sold and are now selling its Quin-Coco for plaintiff's Coco-Quinine; but it avers that if any druggist has done so it has been without the instruction, suggestion or knowledge of the defendant. The defendant is advised, and here avers that the acts of druggists not authorized by defendant do not affect defendant's right or liability in the premises.

The defendant has no knowledge or information that customers have frequently or ever received Quin-Coco with the druggists' own label bearing the name of Coco-Quinine, but avers that if such has ever been the case, it has been without the knowledge, instruction,
reresentation or suggestion of the defendant, and has been
966 done of such druggists' own unaided volition, and defendant is advised and here avers that such unauthorized act of any druggist does not affect defendant's right of liability in the premises. The defendant denies that any act on its part has ever unlawfully or wrongfully deprived or is now depriving the plaintiff of sales of its said product, or has resulted in deceiving or defrauding purchasers and users who intend to buy and expect to receive plaintiff's Coco-Quinine. The defendant denies that it has by any unlawful or wrongful method whatever pushed the sale and distribution of Quin-Coco to the trade. The defendant has no knowledge that Quin-Coco has been largely or ever retailed as plaintiff's Coco-Quinine, but it avers that it has never authorized any person whatever to retail or sell Quin-Coco to the trade as plaintiff's Coco-Quinine. The defendant is advised and here avers that it is not bound by the acts of retail druggists not authorized by it.

WM. R. WARNER & CO.

FRANCIS RAWLE,
Solicitor for Defendant.

Notice of he above motion with a copy thereof is accepted. No objection is made to granting the same, it being expressly understood that this acceptance and waiver of objection in no manner or degree acknowledges or admits the truth of allegations or statements thus inserted in defendant's Answer.

May 8, 1916.

E. W. BRADFORD,
Counsel for Plaintiff.

Before Thompson, J.

Defendant's motion to amend the answer and to file an answer to plaintiff's amendment of the bill is allowed.

May 10, 1916.

By the Court,

Attest, GEORGE BRODERICK,
Deputy Clerk.

567 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY & COMPANY, Plaintiff,

vs.

WM. R. WARNER & COMPANY, Defendant.

Depositions in the Above-entitled Cause, Taken at Room No. 1004, West End Trust Building, Philadelphia, Pa., on June 8th, 1917, in Accordance With the Order of the Court on the 7th Day of May, 1917; Such Depositions Being in Surrebuttal.

Present:

E. W. Bradford, Esq., for Plaintiff.
Roger S. Baldwin, Esq.,
Francis Rawle, Esq., for Defendant.

CHARLES E. MCNULTY, a witness already called and sworn in the cause, is recalled for further examination, and testified as follows:

By Mr. Rawle:

Q. 1. Have you already been sworn and testified as a witness in this case?

568 A. I have.

Q. 2. Does your business continue to be the same as it was when you were a witness?

A. Yes.

Q. 3. Have you known Earl R. Peabody, the witness who testified in this case on behalf of the defendant?

A. I have.

Q. 4. When did you first have anything to do with him, in the business of the defendant?

A. In June, 1911, in Boston.

Q. 5. At what hotel there?

A. At the Essex Hotel, in Boston.

Q. 6. State how you happened to meet, and where the interview was held?

A. I met Mr. Peabody on instructions from William R. Warner & Company, at the Essex Hotel, in Boston.

Q. 7. Where did the interview take place?

A. It took place in my room, at that hotel.

Q. 8. What did you talk to him about, stating it broadly?

A. I talked to him, in general, about our line, the various products, and the methods used in presenting and selling to the trade.

Q. 9. State whether or not he was a new salesman, and you were instructing him as to his duties?

A. He was a salesman who had been with the firm a short time, and the purpose of my business there was to acquaint him better with the line, and the policies of the house; also to give him any information that he might be desirous of obtaining.

Q. 10. Earl R. Peabody, when testifying as a witness on behalf of the plaintiff, in rebuttal, testified as follows (page 675):

"Q. 20. What were the instructions he gave you?

A. When Mr. McNulty called me to the Essex Hotel in 569 Boston, his first instructions to me were to send me to a Riker-Hegeman drug store, to purchase two bottles of Fletcher's Castoria. I did so and returned the two bottles to him. He immediately took them and poured their contents into the Dr. Hobson's Castoria bottle and stated that, 'I guess they can't tell any difference now between the Dr. Hobson's and the Fletcher's.' This bottle of Dr. Hobson's containing the Fletcher's Castoria he used in making the sales during the time he was with me. In selling other preparations in the Hobson line I have repeatedly heard him mention competitors' names."

Will you state whether or not these statements are true?

A. They are absolutely untrue. They are not true.

Q. 11. Please take up what I have read, reading it from the record, which I hand you, and refer to each of the statements there made, and say what you have to say as to each statement?

A. The first statement that my first instructions were to send him to Riker-Hegeman drug store to purchase two bottles of Castoria is not so. That is not true.

Q. 12. State whether or not you sent him any place to purchase one or more bottles of Fletcher's Castoria?

A. I did not.

Q. 13. State whether or not he had then in his possession any

bottles of Fletcher's Castoria, at this interview in your room at the Essex Hotel?

A. I had none in my possession, and if he had them, I did not see them.

Q. 14. State whether or not it is true that at that meeting between you and Peabody you took bottles of Fletcher's Castoria and poured their contents into a Warner Castoria bottle of any brand or name, and made the statement that Peabody attributes to you, in the answer read to you?

570 A. That is not true, that I did this.

Q. 15. After this interview did you go with Peabody to solicit the trade of any druggists?

A. I did.

Q. 16. During how many days did you work the business together?

A. About three days.

Q. 17. Will you state whether or not you had during such working, in your possession any bottle of any kind containing Fletcher's Castoria?

A. I did not.

Q. 18. Will you state whether or not at that time, or any occasion with Earl Peabody, you did any of the things which he there attributes to you, in answer to Q. 20.

A. I will say positively that I did not do any of the things which Mr. Peabody claims I did, in his answer to Q. 20.

Q. 19. Were you then engaged in soliciting sales of Dr. Hobson's Castoria?

A. No. We had no such drug as Dr. Hobson's Castoria.

Q. 20. What was the name of your Castoria product?

A. It was "Pitcher's Baby Brand Castoria."

Q. 21. The last sentence in Peabody's answer to Q. 20 is:

"In selling other preparations in the Hobson line I have repeatedly heard him mention competitors' names."

What have you to say about this?

A. It is very customary, in showing a varied line, like ours, that a dealer may mention a competitor's name. There is no doubt but what at times I have mentioned a competitor's name. But in so doing, it was, no doubt, in answer to something that the druggist would ask, as questions would at various times come up, which would be impossible to answer.

571 Q. 22. Have you an established practice during the ten years of salesmanship, in regard to mentioning competitors' names?

A. Yes, sir.

Q. 23. Is there any practice inculcated by your house?

A. Yes, I have a regular custom that I follow, and there is a rule regarding this, that was taught me by the house.

Q. 24. What is that custom, and what is the rule?

A. The custom is to mention the competitors' names as little as possible, and only at times when it is necessary to make a clear answer to some question asked by the druggist.

Q. 25. And what is the rule of the house?

A. The rule of the house is not to mention competitors' names at all.

Q. 26. Earl Peabody further testified as follows (page 675):

"Q. 1. Describe his methods of using the bottle of Castoria referred to in your last answer.

A. He would ask the prospective buyer to compare the contents of Dr. Hobson's Castoria, with one of the original Fletcher's and ask him if he could detect any difference in taste or color of the two preparations and that the Dr. Hobson's contained more than the original Fletcher's, and that the margin of profit was greater."

State whether or not, in connection with Peabody, you used such methods as he has there testified to?

A. I cannot recall that I did, although it is customary to show my bottle of Pitcher's Baby Brand Castoria to convince the dealer of its being a pleasant preparation. I have often featured its comparative size, as a selling point, and the margin of profit, as a reason for the dealer's buying.

Q. 27. The bottle referred to by Peabody, in his answer
572 to Q. 21, which has just been read to you, was a Warner bottle, emptied of its original contents, and labelled with Fletcher's Castoria. That is what Peabody claims in his answer. Will you state whether or not you had, during your work with him, any Warner bottle, filled with Fletcher's Castoria, which you used in soliciting the trade of the druggists?

A. I did not have a bottle of Pitcher's Baby Brand of Castoria, filled with Fletcher's Castoria. If Mr. Peabody had such a bottle, I did not know it. There was none of that character used, to my knowledge, while working with Mr. Peabody.

Q. 28. How is the Warner Baby Brand Castoria sold, in cartons, or how?

A. Yes, the Pitcher's Baby Brand Castoria is sold in bottles, enclosed in a carton.

Q. 29. How is Fletcher's Castoria sold?

A. That is in bottles, wrapped and sealed on both ends, top and bottom.

Q. 30. Was there any difference in the difficulty of opening the two different articles, for examination?

A. There would be, if it was done.

Q. 31. Well, explain?

A. Because, in order to get into the Pitcher's Baby Brand package, all you had to do was to open the top flap of the carton, whereas, to examine the Fletcher product, it would be necessary to break the seal.

Q. 32. And spoil the package?

A. No, not necessary to spoil the package, but put it in such a condition as it would not be acceptable to all purchasers.

Q. 33. Was there any way, therefore, of comparing the taste of the two products, as a matter of practice?

A. Not without opening the packages, as I have previously stated
Q. 34. Will you state whether or not the formulas are printed on the Baby Brand package, and on the Fletcher's Castoria package anywhere?
573 A. The ingredients are listed. The ingredients are printed on there, and the quantitative analysis not shown.
Q. 35. Will you state whether or not these ingredients, as expressed on the two different packages are the same?
A. They were different.

Mr. Bradford: This line of questioning is objected to as outside of the authority granted by the order of the Court; and also is calling for evidence that is immaterial, irrelevant and incompetent.

Q. 35. Will you state whether or not the Castoria made by different houses is extremely common, and likely to be found in drug stores?

Same objection as before.

A. There are various brands of Castoria manufactured and marketed.
Q. 36. Will you state whether or not it is commonly found in every drug store?
A. Castoria is commonly found in every drug store.

Same objection as before.

Q. 37. Will you state whether or not it is an extremely well-known product among druggists?
A. It is.
Q. 38. Earl R. Peabody further testified as follows (page 677):

"Q. 31. What was the chief requisite of salesmanship impressed upon your mind by Mr. Hagaman, if any?
A. There was no chief requisite that Mr. Hagaman impressed upon my mind any more than to make all the sales that I could.
Q. 32. Was this likewise impressed upon your mind by Mr. McNulty?
A. It was."

574 What have you to say as to this statement by Mr. Peabody?
A. It is unlikely that I tried to impress upon Mr. Peabody that the chief requisite was only to make all the sales that he could, as I went over our rules for salesmen, with every man I called on.
Q. 39. How long did this interview in your bedroom, with Peabody, last?
A. About an hour.
Q. 40. What did you discuss with him?
A. I discussed the line, in general.
Q. 41. What do you mean by "the line?"
A. The various products that we manufactured.
Q. 42. And that he was to sell?
A. Yes, that he was to sell.

Q. 43. State how far you explained the qualities of these various articles to him?

A. I explained as far as time would permit.

Q. 44. State how far you inculcated the rules of the house, or the rules of salesmanship, upon Peabody's mind; I mean, to what extent you did so?

A. I went over the rules thoroughly.

Q. 45. Will you state whether or not the rules that you went over with him on this occasion were those found in the "Salesmen's Confidential?"

A. They were.

Q. 46. Earl R. Peabody further testified as follows (page 685):

"X Q. 75. Did you have on your list a preparation of iron, quinine and strychnine?

A. Please state what list you mean. I had several lists.

X Q. 76. Were you selling a preparation of that kind for Wm. R. Warner & Co.?

A. Yes, I attempted to sell his preparation, but with instructions that it could be used when another manufacturer's brand is specified."

575 Will you state whether or not you ever gave such instructions to Earl R. Peabody?

A. I positively did not.

Q. 47. Jesse E. Greene, a witness called on behalf of the plaintiff, in rebuttal, testified that he had been a retail druggist at Spartansburg, South Carolina, and he further testified as follows (page 732):

"Q. 8. Explain more fully, giving the facts covering any incident, such as suggested in my former question, either by Mr. Hardy, or any other representative of Wm. R. Warner & Co.?

A. On one occasion Mr. Hardy called with another gentleman, whom he introduced as Mr. McNulty. He introduced Mr. McNulty as sales manager or assistant sales manager, and I went through the line with Mr. McNulty, who did the talking. In the course of that interview he showed me two items and suggested that they could be used for other preparations.

Q. 9. What were the items referred to in your last answer?

A. One was a pill containing Aloin, Belladonna, Strychnine, and Ipecac, the same formula as Lapactic pills manufactured by Sharp & Dohme, and the other was a chocolate syrup of Quinine which he said was the same thing as Lilly's Coco-Quinine."

Will you state whether you remember having such an interview with the druggist named Greene, at Spartansburg, South Carolina?

A. I do not remember of having an interview with Druggist Greene.

Q. 48. Did you ever know a druggist of that name at Spartansburg?

A. If I did, I cannot recall him.

Q. 49. It may refresh your recollection as to this witness, Greene, to read the answer on page 739, to R. D. Q. 60, which I will
576 ask you to read for the record, and not spread it out on the notes.

A. (Witness reading.) There is nothing in that answer that would recall to my mind the fact of having that interview with Druggist Greene.

Q. 50. Now, referring back to the answer of Greene at Q. 8, in which he testified that you had showed him two items, and suggested that they could be used as substitute for other preparations; and the witness further testified that one was a pill of A. B. S. and I. and the other a chocolate syrup of quinine product. What have you to say as to this statement?

A. As regards his claim of my saying that the two products could be used as substitutes for other preparations I will deny this, and will add that the word "Substitute" is a word that I never use. As regards the formula of our pill Aloin, Belladonna, Strychnine and Ipecac having the same formula as the Lapactic pill, of Sharp and Dohme, it is possible that I might have admitted this, because the formulas are on both packages. As regards their size and shape and color, I would also say this, that it would be very apparent.

Q. 51. This similarity would be apparent by comparison?

A. Yes, sir; and as regards our chocolate quinine syrup, being the same as Lilly's Coco-Quinine, I would not make this assertion, because I do not know the formula of Lilly's Coco-Quinine, as it was not on the package.

Q. 52. If you had desired to express similarity, in what words would you have expressed it?

A. If the question was asked me, whether or not I considered the product the same, I would say that I considered them therapeutically the same.

Q. 53. Will you state whether or not you have ever in your salesmanship stated that the product of your house could be used
577 as a "Substitute" for a similar product of another house, or any substantially same expression?

Mr. Bradford: Objected to as not within the authority of the order of the court for the examination of this witness.

A. I have never suggested that a product of our house should be used as a substitute for another specified preparation.

Q. 54. (Last question re-read.)

A. I have not.

Cross-examination.

By Mr. Bradford:

X Q. 55. What edition of Warner's "Salesman's Confidential" did you have during your interview with Mr. Peabody in Boston, respecting which you have just testified?

A. Well, I have no way of identifying the edition.

X Q. 56. Can you say that it was the edition of 1911?
A. I could not say positively.
X Q. 57. Did I understand you to testify that William R. Warner & Company only sold what you have termed as "Pitcher's Castoria Baby Brand"?
A. We had another product.
X Q. 58. What was the other product?
A. It was "New Life Brand Castoria."
X Q. 59. Was not Pitcher's Castoria Baby Grand sold under the label of the "New Life Remedy Company," of St. Louis, Missouri?
A. Yes.
X Q. 60. Didn't the Pfeiffer Chemical Company sell a package of Pitcher's Castoria under their own label?
A. Yes.
X Q. 61. Separate and distinct from the so-called Baby Brand?
A. Yes.
X Q. 62. And a different size?
A. Yes.
X Q. 63. Different in price?
A. Yes.
X Q. 64. Was the New Life Remedy Company another one of the concerns, the products of which were included in the Warner line?
A I think so.
X Q. 65. How many interviews did you ever have with Mr. Peabody in Boston while he was working for the William R. Warner Company?
A. That question is not just clear to me.
X Q. 66. On how many different visits to Boston did you meet with and have interviews with Mr. Peabody while he was employed by William R. Warner & Company?
A. Just one.
X Q. 67. You had not, then, met Mr. Peabody in Boston prior to the interview you have referred to, in your direct-examination?
A. No.
X Q. 68. And didn't see him at any subsequent time?
A. Not that I recall.
X Q. 69. Do you recall the names of any drug stores in Boston where you solicited business in company with Mr. Peabody, during the three days that you traveled with him at that time?
A. I do not.
X Q. 70. You probably called on quite a number?
A. Yes.
X Q. 71. How often have you called on the drug trade in Boston?
A. I have never called on all of them.
X Q. 72. How many times have you called on any of the druggists in Boston, to solicit trade, since you have been working for William R. Warner & Company, or the Pfeiffer Chemical Company?
A. I would say four times.
X Q. 73. You usually called on the same druggists, or substantially the same, each time?
A. No.

X Q. 74. Did you call upon some of the same ones each time?

A. I could not say that I did.

X Q. 75. You stated in your direct-examination, as I understood you, that the Pitcher's Castoria Baby Brand bottle does contain more of the product than the Fletcher's Castoria bottle. About what is the difference in the size of the two bottles, and in making your answer state the contents in ounces, or fractions of ounces.

A. The present size of the Pitcher's Baby Brand Castoria package is three ounces, approximately; that of the Fletcher's is one ounce and seven drams.

X Q. 76. Was this true at the time of your interview with Peabody, respecting which you have testified?

A. I can't say that it was exactly the same.

X Q. 77. Do you recall whether or not the size of your Baby Brand Castoria bottle has been increased since that time, and, if so, when?

A. It has been increased, but I cannot tell you just when.

X Q. 78. Approximately, when?

A. Possibly four or five years ago.

X Q. 79. Which is the larger, the Baby Brand bottle, or the Pfeiffer Chemical Company Castoria bottle?

A. We have two sizes of the Baby Brand castoria, and have only that product now.

X Q. 80. What is the difference in the two sizes?

A. It is three ounces.

X Q. 81. What is the contents of the larger sized bottle?

A. It is six ounces.

X Q. 82. How long has this package been on the market?

580 A. I can't tell you.

X Q. 83. Approximately how long?

A. I have no way of approximating it.

X Q. 84. Was it on the market at the time you had your interview with Mr. Peabody in Boston?

A. I do not think it was.

X Q. 85. Would the contents of the two Fletcher Castoria bottles more than fill one of the Pitcher Castoria Baby Brand bottles?

A. Yes, the smaller size.

X Q. 86. What do you mean by going over the rules of the house "thoroughly" with Mr. Peabody? I mean to inquire what particular rules, and how much time did you devote to inculcating these rules at this interview?

A. By going over the rules "thoroughly" I mean, by reading and explaining the rules. The amount of time consumed in so doing, I would say, approximately, was from twenty to thirty minutes.

X Q. 87. You have visited Spartansburg, South Carolina, in the coure of your work soliciting trade, have you not?

A. Yes.

X Q. 88. And called on the drug stores there?

A. I have called on some of them.

X Q. 89. It is not a very large city, is it?

A. I really don't know. I do not think it is very large.

Redirect examination.

By Mr. Rawle:

R. D. Q. 90. When you did call on the drug stores at Spartansburg, was that in your territory, or were you simply going with Hardy, whose territory it was?

A. It was not my territory. I was simply going with Hardy, whose territory it was.

R. D. Q. 90*a*. You have been asked about the New Life Company, and you have been asked about the Baby Brand Castoria. Please state whether or not the Baby Brand Castoria was the Pfeiffer product, which came to the Warner Company when the Pfeiffer Company came to Philadelphia in 1908?

581

A. Well, that was my first knowledge of the product.

R. D. Q. 91. You were originally in the employ of the William R. Warner Company, before 1908, were you not?

A. Yes, sir.

R. D. Q. 92. When the present company was formed in 1908, you passed into its employ?

A. Yes.

R. D. Q. 93. Now, at that time, will you state whether or not the Baby Brand Castoria was a Pfeiffer product, as to which the Warner Company then became the selling agents?

A. Yes.

R. D. Q. 94. Under cross-examination reference has been made to other Castoria products than the Baby Brand, as to which you have testified, when you were testifying in relation to what passed between you and Peabody. Please state whether at the time you were instructing Peabody in his duties, at the Essex Hotel, you had on your list for sale any other Castoria than the Pitcher's Baby Brand Castoria?

A. The product which I remember more distinctly about is the Pitcher Brand, as its title differentiated it from other castorias.

R. D. Q. 95. Mr. Peabody testified that you had Fletcher's Castoria at the Essex Hotel, and that you poured some of it in a Hobson's Castoria bottle, and you testified that what you were selling then was Baby Brand Castoria, and that you did not have any Fletcher's Castoria, or pour any of it into the Baby Brand bottle. Please state whether or not the same thing is true as to any other Warner Castoria product that you might have been selling at that time?

582

A. It is true. I did not pour, or see anyone else pour any Fletcher's Castoria into any bottle that formed a part of our sales or sample outfit.

Recross-examination.

By Mr. Bradford:

R. X Q. 96. What was your position with the house when traveling with Hardy in South Carolina?

A. My position was that of special salesman.

R. X Q. 97. And your duties?

A. Were to secure new salesmen, and working with them, and the others, the older ones.

R. X Q. 98. Do you still hold such a position with the company?

A. I do not.

R. X Q. 99. What is your present business?

A. A regular salesman.

R. X Q. 100. When was that change made from the position you then held, to the position you now hold?

A. I think it was in the Fall of 1912.

R. X Q. 101. Have you been in your position continuously since the Fall of 1912?

A. No.

R. X Q. 102. What territory did you take in October of 1912?

A. I didn't take any territory.

R. X Q. 103. What position were you given at that time?

A. I was given a position with the Dr. Earl S. Sloan Company. I was given the position of working for Dr. Earl S. Sloan Company of Boston.

R. X Q. 104. This was the time when the Sloan Company was acquired by the William R. Warner Company?

A. No, it was not that time.

R. X Q. 105. Was the Earl S. Sloan Company owned by the William R. Warner and Company at that time?

583 A. Yes. That is, they were affiliated. I cannot say about the ownership.

R. X Q. 106. Was there any change, so far as your superiors were concerned?

A. No.

R. X Q. 107. How long did this employment last?

A. I think, to the latter part of April, of the following year.

R. X Q. 108. What position were you then given?

A. A position with the Sutherland Medicine Company.

R. X Q. 109. Was this another company connected with William R. Warner & Company, in the same manner as the Sloan Company?

A. I believe it was.

R. X Q. 110. Your employers were virtually the same?

A. Yes.

R. X Q. 111. How long did this position last?

A. Until July 31st of the same year.

R. X Q. 112. What position were you then given?

A. I was returned to the position of special salesman.

R. X Q. 113. For William R. Warner & Company?

A. Yes.

R. X Q. 114. How long did this position last?

A. Until January of the following year.

R. X Q. 114½. What position were you then given?

A. Regular salesman.

R. X Q. 115. What territory?

A. Central New York.

R. X Q. 116. How long did you hold this position?

A. I am holding it at present.

R. X Q. 117. Were you holding a position as a regular salesman, with the territory in Central New York, when you travelled with Mr. Rawle, during the taking of the depositions for the plaintiff in this case?

A. Yes.

384 R. X Q. 118. You have been employed by your present employers, then, in different capacities, in connection with different companies that they controlled, or which are affiliated with William R. Warner & Company, for how many years?

A. Since April 1, 1907.

R. X Q. 119. And your employment with them has been continuous from then to now?

A. Yes.

R. X Q. 120. Was or is Castoria sold to the druggists in bulk? I mean, in packages larger than the three and six ounce bottles, by your house?

A. Yes.

R. X Q. 121. In what other packages?

A. Pint bottles, and gallon bottles.

R. X Q. 122. And five gallons?

A. Yes.

— Q. —. And also five pints?

A. Yes.

R. X Q. 124. How do the retail druggists dispense the castoria purchased by them in these bulk packages?

A. I can't say.

R. X Q. 125. Do you know how they offer it?

A. I do not.

R. X Q. 126. How do you, as a salesman, offer it to the druggists?

A. I don't offer it.

STONEWALL JACKSON NOTTINGHAM, a witness formerly examined on behalf of plaintiff, was recalled and further examined under the order of the Court and testified as follows:

By Mr. Rawle:

Q. 1. Have you already been sworn and have you testified in this case?

A. I have; yes, sir.

385 Q. 2. In whose employ are you now?

A. Richard Hudnut, of New York.

Q. 3. Perfumers?

A. Yes, sir.

Q. 4. You passed from the employ of William R. Warner & Company to the employ of Richard Hudnut?

A. Yes, sir.

Q. 5. Richard Hudnut, a corporation, is now affiliated with the business of William R. Warner & Company, or, in a business sense, amalgamated with them; is that correct?

A. Yes, sir.

Q. 6. Francis M. King, a witness called on behalf of the plaintiff, in rebuttal, has testified that he was at the time a salesman for Eli Lilly & Company, and that he had been in the employ of various drug stores for some years, and for two years worked for himself, and on January 29, 1916, had gone into the employ of Eli Lilly & Company as a travelling salesman, covering the North Georgia territory, except Atlanta, &c., which position he then held. Do you know Francis M. King, and how long have you known him?

A. I have known him six or seven years. I knew him as a clerk, and then, later on, as the proprietor of King's Drug Company in Dalton, Georgia, and later as salesman for Eli Lilly & Company.

Q. 7. Francis M. King testified (page 710) in answer to Q. 7:

"A. On one occasion I remember his suggesting that I buy a pill from him as a substitute for Park Davis & Company's Alophin and an Elixir to replace Battle & Co.'s Papine, both of which items I bought at Mr. Nottingham's suggestion."

Please state whether or not this statement of King is true?

A. It is not true that I offered any substitute for Alophin
586 of Park Davis & Company's Papine. That statement is not true. I have never offered any preparation as a substitute for another.

Q. 8. You have in your hand the printed record of the testimony of King. Please read the long answer to Q. 8, and say what you have to say about the statement there made by King?

A. (Reading:) I did not offer him a pill as a substitute for Alophin Pill, I did not offer him a substitute for Papine. I have no recollection of betting him a cigar.

Q. 9. Will you state whether or not you at that interview suggested to him that he buy your pill "To replace Alophin Pills?"

A. I never did.

Q. 10. Francis M. King testified (Page 710):

"Q. 11. Did Mr. Nottingham ever solicit your order for a preparation called Quin-Coco? If so, what representations did he make respecting this item?

A. He offered Quin-Coco as a substitute for Coco-Quinine on several occasions, once in particular insisting that I try it, but I never did."

Please state whether or not that is true, and whether or not you ever offered King your product, Quin-Coco, as a substitute for Coco-Quinine?

A. King is absolutely untrue in his statement, because I never offered him, or anyone else, Quin-Coco, as a substitute for Coco-Quinine.

Q. 11. King testified (page 711):

"Q. 12. What did he say to you with respect to the two preparations, Coco-Quinine, and Quin-Coco?

A. That they were the same thing; that Quin-Coco could be used for Coco-Quinine; and that I would make more money."

587 What have you to say to these statements? Take them up, one by one?

A. Well, I deny this in every particular. I never suggested to him the substitution, or that Quin-Coco could be used for Coco-Quinine.

Q. 12. What about the stating that they were the same thing?

A. Why, I have never said that they were the same thing. I have always said Coco-Quinine is a smoother, thinner preparation than any other preparation of Chocolate Quinine on the market.

Q. 13. Did you know, or do you now know, the formula and all the ingredients of Coco-Quinine?

A. I did not know the formula of Coco-Quinine, only as it states it—I do not know. I know it contains Sulphate Quinine, and with a chocolate base.

Q. 14. King testified as follows (page 711):

"Q. 13. Mr. Nottingham as a witness for defendant testified in answer to Q. 31, page 399, of defendant's record, that he never suggested to anyone replacing Coco-Quinine with Quin-Coco. Your last answer would seem to indicate that Mr. Nottingham erred in this statement. What have you to say to this?

A. He did offer Quin-Coco to me as a substitute for Coco-Quinine."

State whether or not you ever offered King Quin-Coco as a substitute for Coco-Quinine, as he there states?

A. I never offered King Quin-Coco as a substitute for Coco-Quinine. It seems very peculiar to me that he had so many opportunities to state this at other times, but that he never did before he became an employee of the Eli Lilly & Company.

Q. 15. King testified (page 712) in answer to Q. 20:

"A. I recall once on Nottingham's asking for business of his picking up my stock bottle of Coco-Quinine and asking 'How about sending you a gallon of this at a price?' I turned him down so
588 flat that he didn't worry me about Quin-Coco any more."

What have you to say about this statement by King?

A. I have not the least recollection of picking up a Coco-Quinine bottle and asking King "How about sending you a gallon of that." I deny that I did. I was not selling Coco-Quinine, and therefore, I could not have picked up a Coco-Quinine bottle and suggested that to him, as I never have. I do not remember that at all. I do not remember that incident.

Q. 16. King testified (page 713):

"Q. 21. At any time did Nottingham ever introduce the subject with you by asking you 'How is your stock of Quin-Coco?'

A. No, sir."

Do you remember how you introduced this item to King, or how you were in the habit of introducing it?

A. I don't think that I ever suggested any preparation of Chocolate Quine to King, for the reason that he was, in a sense, was in a section that used practically no Quinine, and there was very little malaria, and therefore, I would not ask him how his Quin-Coco was. I do not remember at all, in Dalton, of saying anything to him about Quin-Coco.

Q. 17. King further testified (page 713) in answer to Q. 22:

"Q. 22. Did he ever introduce the subject with the question 'How is the Chocolate Quinine?'

A. He did not."

What do you remember about this?

A. The same as before.

Q. 18. King testified as follows, in reference to Quin-Coco (Page 714):

"Q. 29. Do you know whose product it is?

589 A. My recollection is that it has a Searle & Hereth label on it.

X Q. 30. Do you know whether it is known in the trade as their product?

A. Quin-Coco is known to the trade generally as Warner's substitute for Coco-Quinine."

Is that true?

A. I never heard of it as that, no, sir.

Q. 19. King testified as follows (page 721), in answer to X Q. 56:

"A. I am sorry to say that I bought the two products at Mr. Nottingham's suggestion, as a substitute for the two items in question and used them as such, not only on one occasion, but to my certain recollection twice. And I consider that I violated the ethics of my profession in allowing Mr. Nottingham to persuade me to do this."

Will you state whether or not you ever suggested to this witness, King, that he should buy any of your products as a substitute for he products of another house?

A. I never suggested to King that he use these two products in question, as a substitute. I never suggested to him or anyone else. I never tried to persuade him. In fact, I never have suggested substitution. I consider it not good salesmanship, but a reflection on the druggist's honesty. I would not know how to go about calling on a retail druggist and suggest to him that he substitute one article for another on a call for that article.

Q. 20. The same witness, King, testified about your having picked up from his counter a stock bottle of Coco-Quinine, and he was asked the following question (page 723):

"X Q. 67. When he picked up your stock bottle of Coco-Quinine and made the remark that you have stated, did you understand him to offer to sell you specifically some Coco-Quinine, or a product similar to it?

590 A. I understand that he was offering me a substitute for Coco-Quinine."

Will you state whether or not you said anything whatever to King on that occasion, or on any other occasion, which would justify him in understanding that you were offering him a substitute for Coco-Quinine?

A. I never suggested to King, or any other witness, that he use Quin-Coco as a substitute for Coco-Quinine.

Q. 21. Do you recollect picking up a bottle of Coco-Quinine from King's counter?

A. I do not recollect doing so.

Cross-examination.

By Mr. Bradford:

X Q. 22. When did you begin your employment with Richard Hudnut?

A. January 1, 1917.

X Q. 23. When did you cease your employment with William R. Warner and Company?

A. December 31, 1916.

X Q. 23. Were you employed continually by William R. Warner & Company prior to December 31st, 1916, and since your previous testimony in this case?

A. No, sir.

X Q. 24. How long were you out of employment with William R. Warner & Company?

A. For three months.

X Q. 25. What period?

A. I would say about April, somewhere in April. It may have been a little over three months, but not long. It was less than four months.

X Q. 26. From April, 1916?

591 A. July, but I do not remember just the date. It was possibly a little over three months, but not much.

X Q. 27. Approximately, then, from April, 1916, until July, 1916?

A. Until July, 1916, yes, sir.

X Q. 28. By whom were you employed during that time?

A. Frederick Stearns & Company.

X Q. 29. When were you re-employed by William R. Warner & Company?

A. July 1, 1916.

X Q. 30. What were your duties?

A. Salesman.

X Q. 31. What territory?

A. A part of Georgia and Florida.

X Q. 32. The same territory that you had previously?

A. Different territory.

X Q. 33. What territory were you serving prior to April, 1916, as salesman for William R. Warner & Company?

A. Part of Georgia.

X Q. 34. Please state what part?

A. I did not go practically any place north of Atlanta. You may say, Atlanta, Savannah, Columbus, and intermediate territory; that would cover it.

X Q. 35. How long had you been in this particular territory?

A. About seven years.

X Q. 36. As a salesman of William R. Warner & Company all of this period?

A. Up to the time I left them.

X Q. 37. Who succeeded you in this territory?

A. The territory was divided. Mr. Wilson has part of it,—Mr. J. F. Wilson, and F. E. Mize has the other part of it.

X Q. 38. When you returned to their employ in July, 1916, you did not work in this old territory?

592 A. It was different territory entirely that I took.

X Q. 39. Has there been any change in your employers or superiors since you started working for Richard Hudnut?

A. Why, I am working under—it is a different proposition altogether.

X Q. 40. Who employed you to work for Richard Hudnut?

A. Mr. Pfeiffer.

X Q. 41. Which Mr. Pfeiffer?

A. Why, I wrote to both of them. Mr. G. A. Pfeiffer. He has charge of Richard Hudnut.

X Q. 42. Do you confine yourself to the work of selling goods?

A. Yes, sir.

X Q. 43. At the present time?

A. Yes, sir.

X Q. 44. And handle the Richard Hudnut line exclusively?

A. Yes, sir.

X Q. 45. In your direct examination you said that Mr. King had plenty of opportunities to state this at other times, but did not do so until he was employed by Eli Lilly & Company. What do you mean by that?

A. I state just exactly the statement that he made there, the one that I was answering.

X Q. 46. What opportunities had he had to make such a statement previously?

A. What I mean by that, that Lilly has told them or told all their men, to get all the evidence they could against Warner salesmen showing that they suggested substituting Quin-Coco for Coco-Quinine; and the fact came to me that it is so peculiar, out of all the territory that I mention, in that big territory, that the only

person in the whole territory was, you may say, a little boy, under age. I do not think that he was over eighteen and a half years, when he gave that testimony.

X Q. 47. To whom do you refer?

593 A. To Mr. Jolly, of Marshalltown. It seems like, in all that territory, if I was going to offer, or suggest the substituting of this article for Coco-Quinine, it seems that someone would have known of it besides Mr. Jolly. I do not count Mr. King. He didn't know anything until he was employed by Lilly.

X Q. 48. Do you mean to suggest that because Mr. Jolly, who was a young man, that he is not capable of telling the truth?

A. I say that he did not tell the truth, and I say that he is under age. I would not say that a man eighteen or nineteen years —I would not class him with a man of 25—he is not matured.

X Q. 49. What is there to keep him from telling the truth? Is it not true, that some men, who are most mature, are the most skillful in telling untruths?

A. Well, I say that Jolly did not speak the truth in his statements.

X Q. 50. Is not maturity in men, mature judgment, quite as useful in evading the truth, and in telling untruths, as in telling the truth?

A. I say that he is under oath, and it looks like I should pick a man——

X Q. 51. Answer my question. (Last question repeated.)

A. I mean that as a man—after he grows up, he has had more of a chance to learn to tell the truth. He has had more experience. He looks on life more seriously, the older that he gets, than when he was a kid.

X Q. 52. You say that you never heard anyone say or suggest that Warner's Quin-Coco is known in the trade as a substitute for Coco-Quinine?

A. I never have, and I have been over considerable territory, too.

X Q. 53. And you never said to King, or to any other druggist, that they might sell Quin-Coco to be used as a substitute for

594 Coco-Quinine; or offer any other product, representing it as a substitute for any other product?

A. No, sir, I never suggested to King that he use Qin-Coco as a substitute for Coco-Quinine. In fact, I have called on druggists for many years, and I have never suggested substitution. To begin with, I think it would reflect on a man's honesty at once, if I were to go to a man and suggest that he substitute.

Redirect examination.

By Mr. Rawle:

R. D. Q. 54. When I examined you, I was not aware that there had been a break of three or four months in your employment. Why did you leave Warner in 1916?

A. I had an illogical territory from the standpoint of the house. I understood that fully, but I did not want to give up my old territory, and the trade. I had been working continuously and had it established. I did like a lot of people do, and make foolish movements, sometimes.

R. D. Q. 55. You left of your own volition, did you?

A. Yes, sir.

R. D. Q. 56. There was no trouble?

A. No trouble whatever. The only trouble was the change of territory, and that was on account of being illogical, and to begin with, on account of the death of the man, that made a territory vacancy.

R. D. Q. 57. How long since you began to sell drugs for Warner & Company, or any of their concerns?

A. About seven years.

Recess until 2.45 p. m.

595 At 2.45 p. m.

Present: Parties as before noted.

GEORGE M. BERINGER, a witness recalled on behalf of the defendant for further examination under the orders of the Court, having been duly sworn, was examined and testified as follows:

By Mr. Rawle:

Q. 1. Are you the Dr. George M. Beringer who has previously testified as an expert witness?

A. I am.

Q. 2. Did you receive from me in December, 1916, a copy of the testimony of Francis E. Bibbins, taken on behalf of the plaintiff in this case on rebuttal, and ten specimens in 2-ounce bottles all sealed?

A. Yes.

Q. 3. What are the facts in regard to that?

A. In December, 1916, Mr. Rawle handed me the specimens of syrups and the testimony of Mr. Bibbins. At his request I have examined one set of the samples. There were two sets of samples, each having a duplicate sample of the same number. Of the ten samples I took one bottle of each for my examination. In each case, with the exception of No. 9, I took the vial that contained the smaller amount of liquid. In No. 9 I was compelled to take the one containing the larger amount, because the other contained too small an amount for examination.

Counsel for defendant states that at the examination of the witness Bibbins in Indianapolis, Mr. G. A. Pfeiffer, with the consent of plaintiff's counsel, poured from each of the ten Bibbins sample bottles a certain amount of the contents thereof into two different two-ounce

bottles, making 20 bottles in all, 2 specimens of each sample.
596 Mr. Pfeiffer sealed these with sealing wax and took them from Indianapolis. A few days later he sent them to defendant's counsel, by whom they were received in precisely the same condition in which they had left Mr. Bradford's office at Indianapolis.

After making a suitable arrangement with Mr. Beringer to examine these specimens of the Bibbins samples, counsel for defendant sent all the 20 bottles in their sealed condition to Dr. Beringer.

Dr. Beringer now returns 10 of these 2-ounce bottles, being one of each sample, in their original sealed condition. The sealed bottles have merely been in the possession of Mr. G. A. Pfeiffer, of counsel for defendant, and of Dr. Beringer. When Dr. Beringer completed his investigation he returned 10 of these bottles in their original sealed condition to defendant's counsel, who now produces them.

Q. 4. Then I understand tha you opened ten of these specimens and left ten unopened?

A. I opened one of each; ten samples opened and ten remained unopened.

Q. 5. As to the 10 remaining unopened, do you now find them here in this room in the same sealed condition in which you received them from me?

A. They are in the same condition with the corks tight, and sealed as they were when I first saw them.

Q. 6. What about the ten which you opened?

A. The ten which I had opened I returned to Mr. Rawle with the remnants of the contents therein.

Q. 7. When you opened the 10 bottles for investigation, breaking the seal, please state whether or not they were in the same sealed condition in which the other ten now are which remain sealed?

A. They were in identically the same condition so far as tying and sealing.

597 Q. 8. I will ask you what tests you applied to these 10 specimens, beginning with the acidity test?

A. First I examined them as to their physical appearance. Then after opening the package, the vial, the content was examined as to acidity. The test for acidity that I adopted was to take 5 cubic centimeters of the specimen, shake this up with 10 cubic centimeters of distilled water. After allowing the sediment to subside, the supernatant liquid was tested with litmus paper.

At that time, another portion of the sample was taken and tested for flavoring by taking 10 cubic centimeters, mixing it with about 20 cubic centimeters of distilled water, acidifying with hydrochloric acid and extracting with ether. The ether solution was separated, the ether allowed to evaporate off, and this separated out the flavoring, and the yerba santa and the saccharine. These tests were applied to all of the specimens, the whole ten being examined in the same uniform way. Microscopic examinations were likewise made as to the appearance of the contents.

Q. 9. Will you consider the subject of suspension of the quinine sulphate in the preparation and give your opinion as to Mr. Bibbins' selection of the ingredients for his experiments?

A. Do I understand your question relates to the suspending m terial—material selected for suspension?

Q. 10. Yes.

A. The materials selected for these 10 experiments were such are commonly selected for their mechanical power of suspending emulsionizing oils or fats or suspending powders. In some of the he used quince-seed mucilage; in some, he used acacia, some de trine, some gelatine, some tragacanth, some Irish moss and quinc seed mucilage, and others some mixtures *or* two or more.

Q. 11. How did he get at the necessary viscosity?

598 A. That is not stated, how he got at the necessary viscosit I do not see that stated on the labels or in the evidenc They are not of the same viscosity.

Q. 12. Does he appear to have used any additional thickenin material?

A. He has used thickening material and the suspending materi which he reports in his evidence in each case, for instance in No. he reported, according to the evidence, that the thickening w quince-seed mucilage and tragacanth.

Q. 13. Have you any criticism to make on Mr. Bibbins' point view of the problem of suspension in these specimens?

A. From his testimony I was impressed that he was looking upo it as rather a mechanical problem, of simply finding a suspensio agent, a mechanically suspending agent, for the quinine, and so w trying the commonly used suspending materials.

Q. 14. Was there any aspect of the problem which he did n seem to give attention to?

A. The fact that quinine suspension is entirely different fro purely a mechanical problem of distributing an oil or a fat, or su pending an inert powder in suspension. In other words, in ha dling a chemical like quinine, it is especially important to bear mind the changes which may occur in the suspending material which may be present originally in the suspending material, whic would work some change in the condition of the quinine itself.

Q. 15. Do you consider he overlooked the chemical aspect of h problem?

A. That is what I mean. I think he has overlooked the peculi chemical problem presented by quinine in suspension.

Q. 16. What do you consider the requirements of the suspendin material in this preparation?

A. In a quinine preparation?

Q. 17. In a chocolate-quinine preparation?

599 A. That the suspending material must produce a uniform homogeneous liquid that does not separate out, that does n undergo subsequent change, that is not acid when first prepared an does not become acid on keeping, and that remains permanently a uniform, homogeneous, suspending liquid, even after keeping f some time, as necessarily would be done in a package offered in th trade.

Q. 18. What can you say as to the necessity of using ingredien by the use of which the chemical or physical character of a quini

salt will not be affected either immediately or during the keeping of the finished preparation?

A. It is essential that the condition of the quinine salt as quinine sulphate should not be changed in the preparation.

Q. 19. Either at the time of making or thereafter?

A. Either at the time of making or in keeping.

Q. 20. State whether or not you have examined the quinine crystals in each of these specimens and what you found?

A. Under the microscope the powdered crystalline structure of the quinine was examined, in each one of these specimens, and likewise in some of the commercial samples of the chocolate-quinine syrups. In the chocolate-quinine syrups, Quin-Coco and Coco-Quinine, the crystalline structure of the quinine-sulphate was very evident, quite apparent. In a number of specimens examined of these 10 samples, the crystals were more or less attacked, what you might call eroded surfaces, showing that the crystals had been acted on by the suspending liquid and had partly undergone solution. In one specimen the quinine was practically entirely dissolved; in the others more or less so.

Q. 21. What preparation, as you found it, would account for the eroding and the solution, more or less, of the quinine crystals?

A. It is readily accounted for by the acidity. The acid
600 test as described show that each of these ten specimens was acid, and in varying proportions.

Q. 22. Having examined these 10 specimens, what is your opinion as a trained pharmacist, as to whether any of them are pharmaceutically identical with Coco-Quinine Lilly?

A. In my opinion none of them are pharmaceutically identical with Coco-Quinine Lilly.

Q. 23. Will you please take up the specimens in numerical order and state what you found on investigating each of them?

A. In No. 1, said in the testimony of Mr. Bibbins to be flavored with ginger and to contain yerba santa, mucilage of quince and tragacanth as suspending agents, around the top of the liquid, especially around the neck of the bottle, there appeared to be separated nodule-like separations of tragacanth. The odor was that of yerba santa and ginger. The taste was first the pungency of ginger followed by yerba santa, and it soon became distinctly bitter. The glass now shows some separation of the suspending material, tragacanth, and under the microscope it showed some crystals of quinine sulphate; separated portions of tragacanth mucilage and the quince-seed mucilage were unequally distributed throughout the field. The preparation likewise did not pour homogeneously, showing it was not a smooth homogeneous fluid. There is always the tendency in tragacanth emulsions to a separation, because tragacanth does not form a solution, but simply continues to swell and swell and make an uneven mucilage and not a perfect solution. To litmus paper, in the acid test, it gave a distinct acid reaction. The acidity here I think is due to the rapidity with which mucilage of quince-seed deteriorates. That breaks down very readily. I think the acidity in this particular formula was largely due to the decomposi-

tion which takes place so readily in mucilage of quince-seed.

601 Q. 24. What effect has the acidity developed in the specimen upon the bitter taste of quinine?

A. It brings out the bitterness of the quinine perceptibly.

Q. 25. Please state your opinion as a pharmacist as to whether or not the preparation shown in specimen No. 1 is a satisfactory, palatable and marketable pharmaceutical preparation?

A. In my opinion, No. 1 would not yield a satisfactory, palatable and marketable quinine preparation.

Q. 26. Will you please look at the sealed specimen No. 1 and state whether you see any change in that since you saw it last in January?

A. In this specimen I note further separation and unevenness of preparation, indicating some additional decomposition or changes.

Q. 27. Please take specimen No. 2 and state what you found?

A. Specimen No. 2, stated in the testimony of Mr. Bibbins to contain tolu flavoring, with gelatine and mucilage of quince-seed as the suspending agents, there was a marked separation in this specimen, a thin upper layer and a thicker lower layer, and a separation of the tolu in resinous masses on the sides of the bottle. The gelatinous mass is undoubtedly due to the gelatine separating out of the suspending material. This specimen was examined for acid and gave a distinct acid reaction. Under the microscope the mucilage was generally separated in small, separated gelatinous masses and the gelatine in larger globules which were not evenly distributed throughout the field, the gelatine showing in yellow, globular masses; not a homogeneous mixture.

Q. 28. How about the taste?

A. The taste was decidedly bitter.

Q. 29. What about the appearance?

A. The appearance is not that of a homogeneous or satisfactory pharmaceutical preparation.

602 Q. 30. Will you state whether or not in your opinion as a pharmacist the preparation in Specimen No. 2 constitutes a pharmaceutically satisfactory, palatable and marketable preparation?

A. In my opinion the preparation would not be pharmaceutically satisfactory, palatable, perfect or marketable.

Q. 31. Please look at the sealed specimen before you, marked No. 2, before you, and state if you observe any changes in that since you saw it last?

A. I notice some slight further separation, a lighter upper liquid.

Q. 32. Take Specimen No. 3 and state what you found in it upon your investigation?

A. Specimen No. 3 was stated in the testimony of Mr. Bibbins to be flavored with syrup of orange and to contain yerba santa and gum acacia as the suspending agent. There was a heavy deposit on the vial as still shows in this specimen. The liquid was sticky and stringy like mucilage. The taste was quite bitter. Under the microscope the crystals of quinine were shown to be distinctly eroded or eaten away. This specimen gave very marked acid reaction.

Q. 33. Please state how acacia acts when made as mucilage with water?

A. Acacia when mixed with water to form a mucilage is acid. This is a well known fact, that solutions of acacia are distinctly acid in the action and is so stated in the pharmacopœia in describing acacia.

Q. 34. How far has acacia a tendency to fermentation, and is that the same thing as becoming acid?

A. Acacia is very prone to undergo fermentation and in this fermentation, an increased amount of acidity is produced.

Q. 35. What is the effect of this acid on the quinine sulphate content of the preparation?

A. The effect of the acidity would be to dissolve the quinine and bring out the bitterness.

603 Q. 36. What effect would it have on the solution of quinine in the preparation?

A. Increase the amount of quinine in solution and consequently increase the bitterness.

Q. 37. Will you examine the sealed Specimen No. 3 before you and say whether you observe therein any change from its condition when you saw it in January?

A. Still further precipitation is evidenced from simply an examination of the sealed specimen.

Q. 38. Will you state your opinion as a trained pharmacist as to whether the preparation in Specimen No. 3 constitutes a stable, palatable and acceptable product pharmaceutically that could be satisfactorily marketed?

A. In my opinion this preparation would be an unstable one, would not be an acceptable formula or a marketable preparation.

Q. 39. Is it palatable?

A. It is far from palatable.

Q. 40. Please take up Specimen No. 4 and state what you found during your investigations with regard to this preparation?

A. Specimen No. 4 was stated in Mr. Bibbins' testimony to be flavored with syrup of coffee and yerba santa and dextrine used as the suspending agent. This showed some precipitation on the bottle, still evidenced on the sides of the bottle and bottom, poured like mucilage, having the flavor and characteristics of dextrine. The slight flavor of coffee which was first perceptible was soon drowned out by the extreme bitterness of the quinine. Under the microscope the quinine crystals were shown to be broken down and eroded. There was likewise in the microscopic field, starch grains partly altered and distributed unevenly throughout the field. The solution gave a distinct reaction with litmus paper, a distinct acid reaction.

Q. 41. Was it palatable?

A. It was not palatable. There was still another change 604 which takes place in the presence of coffee which was not shown in the other samples presented. Coffee contains caffetannic acid, which precipitates out part of the quinine, and I have no doubt that part of that sediment is due to part of the quinine precipitated out in that form of tannate, so that the quinine is subject

to reactions in two different directions by this preparation. I am now speaking of Specimen No. 4.

Q. 42. Please look at the sealed Specimen No. 4, and say whether it has changed in any respect since you saw it in January last?

A. There appears to be some additional precipitation taken place, which is evidenced on the sides of the bottle.

Q. 43. Will you give your opinion as a pharmacist as to whether the preparation shown in Bibbins' Specimen No. 4 is a pharmaceutically stable and palatable preparation and one which could be successfully marketed?

A. In my opinion this specimen is not pharmaceutically perfect, but is unstable, not satisfactory, is not palatable and could not be successfully marketed.

Q. 44. Take up Bibbins' Specimen No. 5 and state what you found in your examination of this preparation?

A. No. 5, stated in Mr. Bibbins' testimony to be flavored with peppermint and colored green with artificial coloring and suspended in quince-seed mucilage, was less viscous than some of the other specimens. There was decided evidence of precipitation on the sides of the bottle, still showing. The taste was decidedly bitter and it gave a decided acid reaction with litmus paper and the crystals of quinine sulphate, when examined under the microscope, were distinctly eroded and attacked, and there was likewise separation of quince-seed mucilage, showing as I have sketched here the characters of quince mucilage as separated in these specimens (referring
605 to sketch in the witness' hand).

Q. 45. What is the sketch that you have just mentioned?

A. The sketch is a pen and ink sketch showing the appearance of quince mucilage under the microscope as separated out in these syrups containing quince mucilage.

Q. 46. In which specimen number?

A. Nos. 5 and 6 were selected for a sketch as showing the typical separation.

Mr. Rawle: The sheet produced by the witness is offered in evidence and marked "Defendant's Exhibit, Beringer Sketch of Microscopic Appearance."

(Here follows "Defendant's Exhibit Beringer Sketch of Microscopic Appearance," marked page 604*a*.)

Quince Mucilage
in { No 1
No 6.



Irish Moss
Jelly
in No 6.

Jelly with
Barfinger Starch
of
Microscopic appearance
June 8/77 Jew



Eroded Crystals of Quinine Sulphate
in No 7.



Peculiar Bone shaped Eroded Crystals
of Quinine Sulphate ?
in No 8 -

604a

Q. 47. You spoke of precipitation on the sides of the bottle; precipitation of what?

A. The part of the quinine is separated out as well as part of the mucilaginous material separated out.

Q. 48. Have you anything to say about the color of this preparation in No. 5 as a pharmaceutical color?

A. It does not appeal to me as a suitable color for a pharmaceutical preparation. It is a sort of what I would call a coppery green.

Q. 49. Not a true peppermint green?

A. Not a true peppermint green.

Q. 50. Please examine the sealed Bibbins' specimen before you and state whether you observe any changes since you saw it last January?

A. There appears to be some additional precipitation.

Q. 51. Give your opinion as to whether the preparation in Bibbins' Specimen No. 5 would constitute a satisfactory, stable and palatable pharmaceutical and one which could be successfully marketed?

A. In my opinion it would not yield a satisfactory, pharmaceutical preparation nor a stable, palatable preparation that could be successfully marketed.

606 Q. 52. You have said that something is less viscous than something else; please explain?

A. I used the word "viscous" there to show that it was not of the same degree of thickness or body. It was a thinner preparation, more fluid, more liquid preparation, than the other preparations that we had examined prior.

Q. 53. What would be the effect of its being less viscous as a preparation?

A. It would not hold the quinine in suspension satisfactorily. A proper degree of viscosity or mucilaginous quality is necessary to hold the quinine up in proper suspension.

Q. 54. As I am only a layman, please explain what you mean by a precipitation on the sides or bottom of the bottle?

A. A sedimentation or separation of an insoluble portion.

Q. 55. What is the effect of that on the preparation?

A. It shows a lack of homogeneity, through miscibility.

Q. 56. Why is that objectionable?

A. In the administering of a preparation of this kind, unless the medicinal ingredient is equally and thoroughly distributed, as the dose is poured out of a bottle or a portion is dispensed on a prescription, you would not get uniform distribution of the medicinal agent.

Q. 57. You spoke of the quinine sulphate crystals being eroded in some of these specimens and of being attacked; what did you mean?

A. The word "attacked" there I used in the same sense as I might have used the words "acted upon" by the acidity of the fluid, acted upon, eaten away. I used the word attacked because the action was apparently uneven, as I will show you in some of these cases.

Q. 58. My question uses the word "eroded;" will you explain that?

607 A. Eroded is a phrase that is used in chemical and microscopic technology to indicate an action of some chemical

upon a body or a surface by which you have indentations or roughened surfaces.

Q. 59. Please take up Bibbins' Specimen No. 6 and state what your investigations disclose?

A. Bibbins' Specimen No. 6 was said to be flavored, according to the testimony, with benzaldehyde; the suspending materials, Irish moss and quince-seed mucilage. This specimen of the sample was of uneven thickness and showed the separation of gelatinous-like masses. It was decidedly acid and quite bitter to taste. Under the microscope the crystals of quinine sulphate showed that they were acted upon, eroded, and there were separated, the Irish moss, Jelly and the quince-seed mucilage, in different masses. This was apparent even on the surface of the glass bottle as well as under the microscope. In the sketch I have shown, "Beringer Sketch," the typical separation of the Irish moss jelly as occurred in this Specimen No. 6, and likewise the mucilage of quince-seed has separated. These separations were unequally distributed throughout the field, showing the lack of homogeneous suspension.

Q. 60. Please look at the sealed specimen of Bibbins' sample and state whether that has changed since you saw it last January?

A. It shows decidedly the separation of the Irish moss, gelatinous masses on the surface of the glass, glairy, gelatinous masses of the Irish moss jelly.

Q. 61. Will you state whether in your opinion the preparation in Specimen of Bibbins' Sample No. 6 is a pharmaceutically satisfactory, stable and palatable preparation and one that could be successfully marketed?

A. In my opinion this preparation has so many defects that it would not be pharmaceutically satisfactory, would not be stable, would not be palatable and could not be successfully mar-
608 keted. Not the least objectionable feature is the use of Benzaldehyde as a flavoring.

Q. 62. Take up Specimen of Bibbins' Sample No. 7 and state what you found with respect to the preparation therein?

A. Specimen No. 7 is stated by Mr. Bibbins to be flavored with peppermint or wintergreen as a mixture and to contain mucilage of tragacanth and gum acacia as suspending agents and to be colored brown artificially. This showed a separation of brown material on the bottle. It was decidedly bitter as soon as it touched the tongue, acid in reaction and under the microscope there were comparatively few crystals of quinine remaining, and this showed, as shown by the sketch here from No. 7, that they had been acted upon, eaten away, in the liquid. Out of five slides, carefully examined, only six small crystals of quinine, and these all eroded, could be found, but not a single, well-defined, sharp crystal of quinine remaining in these five slides. The field showed the swollen cells of the tragacanth gum and oil flavoring distributed throughout, but there was not a uniform, homogeneous mixture shown. It was quite thick, more mucilaginous, more viscous than most of the other specimens.

Q. 63. What effect had the acacia on the acidity.

A. I am of the opinion that the acidity of this preparation was due largely to the acacia present as one of the suspending ingredients.

Q. 64. Please look at the sealed specimen of Bibbins' Sample No. 7 and state whether it has changed since you saw it in January?

A. I cannot detect from this specimen any additional change. There was the same precipitation which was noted in the other specimen, shown on the glass of this specimen, and the same apparent thickness of fluid.

Q. 65. What is your opinion of this specimen of Bibbins' Sample No. 7 as a pharmaceutical preparation?

609 A. In my opinion it is a very unsatisfactory pharmaceutical preparation, its extreme bitterness and unpalatability rendering it unserviceable as a marketable preparation.

Q. 66. Any other dis-serving qualities?

A. The thickness with which it would pour is not entirely satisfactory, but that is possibly merely minor, but the great acidity and bitterness are the principal objections making it so unsatisfactory.

Q. 67. Please examine Specimen No. 8 of Bibbins' Sample No. 8 and tell what investigation of this specimen disclosed?

A. Sample No. 8 was stated in the testimony to be flavored with compound spirit of orange and to contain starch and mucilage of tragacanth as the suspending agent, and colored artificially. This specimen was unevenly thick and on shaking there was a glairy separation of bubbles, like air bubbles, and a deposit of coloring and gummy matter on the sides of the glass, which still shows very distinctly on this specimen. The odor had become terebinthinate, was decidedly acid to litmus, and the taste was distinctly bitter, the bitterness being apparent as soon as it touched the tongue. By terebinthinate I mean turpentine-like. This was caused by the oxidation of the orange oil; oils of the orange and lemon type are very prone to oxidation, a turpentine odor developing.

Q. 68. What effect does this have on the preparation?

A. It makes it disagreeable as to palatability. Under the microscope were shown starch grains, some of them more or less broken down, swollen cells of the tragacanth and the remnants of crystals of the quinine. These had assumed a very peculiar shape. In this specimen the crystals were eroded, with knob-like or bone-like shaped points, as I have attempted to show in the sketch, "Beringer Sketch," made of typical crystals seen in the specimen. To

610 the litmus test it was decidedly acid.

Q. 69. Look at the exhibit, specimen of Bibbins' Sample No. 8, and state whether you see any changes since you saw it last January?

A. There appears to be a rather increased deposit on the glass containing some of the coloring matter associated with the deposit.

Q. 70. Will you give your opinion as to whether the preparation in this specimen would be a satisfactory pharmaceutical preparation and what its qualities are or are not?

A. I would not consider this formula pharmaceutically a satisfactory one. Starch is not a good suspending material. If it is

used in the dry state it separates out. When it is used in the mucilaginous form it is very prone to decomposition and hydrolysis and fermentation setting in quickly. A starch paste separates into more or less liquid and more or less solid particles, yielding a non-homogeneous medium. The preparation as shown was in my opinion far from palatable and would not be acceptable as a marketable preparation.

Q. 71. Please take up Specimen No. 9 of Bibbins' Sample No. 9 and state what you discovered in this preparation?

A. Sample No. 9 was stated in the testimony to be flavored with a combination of cassia, peppermint and wintergreen, and to contain as the suspending agents gelatine and tragacanth and to be colored yellow with naphthol yellow S 3. This preparation, although quite thick, showed some sedimentation on the glass. It looked very slimy and poured very thick, like an emulsion of cod liver oil. Its color and appearance were not at all inviting. It gave a decided acid reaction with litmus paper and its taste was bitter immediately, drowning out all the flavor of the aromatics promptly. Under the microscope the separated yellow grains of the gelatine jelly,
611 the swollen grains of the tragacanth were shown and likewise a few eroded crystals of quinine sulphate.

Q. 72. Look at the sealed Specimen No. 9 and state whether it has undergone any changes since you saw it last January?

A. There appears to be more developed glueyness of the gelatine.

Q. 73. What is your opinion of this preparation in Specimen No. 9 pharmaceutically?

A. As a pharmaceutical preparation it would be very unsatisfactory. The suspending medium selected here, gelatine and of course in this case mixed with tragacanth, is objectionable. Gelatine, if in an insufficient amount, will make a rather thin watery paste, insufficiently strong to suspend. If made strong enough, it will separate out in jelly-like masses, not being homogeneous and not making a satisfactory pharmaceutical preparation, and that shows in the sample I have examined of No. 9 and likewise shows in the sealed specimen here. The preparation is not only unsightly and pharmaceutically imperfect, but is bitter and unpalatable, and I could not conceive that it would make a marketable preparation.

Q. 74. Please take Specimen No. 10 of Bibbins' Sample No. 10 and state what your examination of that preparation disclosed?

A. Sample No. 10 was stated in the testimony to be flavored with peppermint, sassafras and wintergreen as a flavoring and gum acacia and quince-seed mucilage as a suspending agent. It appears to have been colored, but the coloring is not stated in the testimony. The sample, while more fluid than some of the other preparations, yet poured with a strong mucilage-like tendency, and there was a dusty deposit on the sides of the bottle. It gave a distinct acid reaction to litmus paper and was very bitter to the taste. Under the microscope it showed the broken-down quince mucilage,
612 some globules of oil of the flavoring, but I was unable to detect any crystals of the quinine sulphate, showing that the acidity had been sufficient to dissolve the quinine entirely.

Q. 75. Please look at the sealed Specimen No. 10 and state whether or not you detect any changes since you saw this last January?

A. There appears to be further separation of the mucilage in this specimen and some deposit of what I suspect is the coloring matter. There is certainly a deposit of redness or coloring matter on the glass of the container.

Q. 76. Give your opinion of this preparation, Specimen No. 10 of Sample No. 10, pharmaceutically speaking?

A. I would consider this pharmaceutically as a very unsatisfactory preparation and would not consider it as having any possibility of successful marketing.

Q. 77. Can you summarize your opinion of all 10 of these specimens of the 10 samples as pharmaceutically successful and marketable or otherwise?

Mr. Bradford: Objected to as calling for unnecessary repetition.

The Witness: In my opinion not one of these 10 formulas and samples submitted yields a preparation pharmaceutically satisfactory, palatable, stable, or possibility for marketing successfully.

Q. 78. State whether or not in your opinion the presence of acidity which you have detected in each of these 10 specimens deprives them of pharmaceutical value?

A. In my opinion the presence of any acidity is incompatible with a satisfactory, tasteless quinine or syrup of quinine in suspension.

Q. 79. Give your reason for this opinion?

A. As the acidity increases or develops, there is a cor-
613 responding increase in the amount of quinine which enters into solution, and as the quinine increases in solution, its bitterness becomes more and more perceptible and objectionable in such a remedial agent.

Q. 80. To make the point clear, will you please state whether you mean by "in solution" and "being dissolved," the same thing in this connection?

A. By the use of the word "solution" I mean that the quinine was dissolved and not simply in a powdered form in suspension, actually in solution or dissolved.

Q. 81. To clear up another point, please state what you mean by holding quinine sulphate crystals in suspension?

A. The term "in suspension" I have used to designate quinine in the form of powdered sulphate being distributed evenly throughout the liquid in its natural or powdered state, not being changed chemically or physically, but remaining in its unaltered chemical condition evenly distributed throughout the medium.

Q. 82. State whether or not that condition is necessary in order to constitute a successful and stable pharmaceutical preparation of a syrup of quinine?

A. The homogeneous suspension of the quinine is essential to the preparation of a pharmaceutically perfect, tasteless quinine syrup.

Q. 83. I understand that you are familiar with Quin-Coco and Coco-Quinine; do you find in those two preparations the presence

of the qualities which you have said are necessary for a tasteless syrup of quinine preparation?

A. They are neutral, that is free from acidity, and the quinine is in suspension—a homogeneous preparation.

Q. 84. Are they free from the deficiencies which you have pointed out and which you have discovered in some one or the other of these ten specimens?

A. Those two preparations as I have examined them have
614 always proved to be free from these deficiencies that have been apparent in these ten specimens.

Q. 85. Please consider the ingredients which were present in these 10 specimens and state what you have to say with regard to each in the matter of the flavoring, the coloring and the suspending mediums?

A. As to flavoring, as a general statement my opinion is that to disquise any drug, or any type of drug, an individual or distinctive flavoring must be selected. There seems to be one or more flavorings that answer the purpose of disguising the various types of drugs better than any other, so that we have what I should term a selection, necessary selection, for each drug or type of drugs to be disguised. In these ten specimens submitted the various flavorings used were ginger, which is probably one of the best that was suggested, but the sample shows that this was far from sufficient to disguise the bitterness of quinine. The tolu used in No. 2 is too mild and too bland a flavoring to be sufficient for quinine. It is more like a blend such as used, for example, when you use vanilla, along with chocolate as a blending of a flavoring. Orange was not satisfactory. In non-alcoholic solutions it is prone to oxidation, and if sufficient alcohol be introduced to prevent oxidation, then you are going to introduce the action of the alcohol on the quinine, bringing out likewise the bitterness, which is objectionable. As to coffee, I have stated the objections to its constituents, the caffeine-tannic acid acting as a precipitant of course on the quinine. The flavor of coffee is not universally liked and is objectionable to quite a few people. Peppermint has not proved satisfactory as a disguise for quinine preparations, but proves quite acceptable for stomachics such as soda and rhubarb, mixtures, for instance, where we use peppermint, but for bitter preparations, such as quinine, it has not proved at all efficient. The almond flavoring, such as the benzaldehyde, which I may ex-
plain is the chemical name for the artificial almond oil and
615 for the constituent which exists in almond oil normally to the greatest extent, is subject to the very serious objection that it is apt to be oxidized, being reduced to benzoic acid and losing its flavor entirely, so this is accepted as a satisfactory flavoring for very few preparations indeed. The various combinations suggested of peppermint, wintergreen, cinnamon and so on, while distinctly different from the chocolate flavorings, do not appear to me as being suitable for the flavoring for quinine, and the specimens of the samples show that they are not sufficient in strength or palatability to serve this purpose.

Q. 86. If you have finished with flavoring, will you proceed with the colorings under the original question?

A. The colorings,—in selecting a coloring for pharmaceutical preparations our rule almost universally has been to select inert vegetable materials. This is shown in our selection in pharmaceutical preparations of the peppermint leaf or the spearmint leaf to get the green for the preparations of peppermint and spearmint, or such colorings as cudbear, red sandalwood, to produce the red or occasionally carmine or cochineal has been used, which is a harmless animal coloring, producing a red coloring.

Coal tar dyes as a rule are not directed for medicinal preparations. While it is true that the Agricultural Department has specified a line of certified colors which they would for the time being permit to be used as coloring for foods, they have not been certified to as recommended for use in drugs, and it has been the custom rather to avoid the use of coal tar or synthetic colors that might be called coal tar derivatives, for use in medicinal products. Some of these colorings are susceptible to change and precipitation, and I suspect that in some of those specimens which show precipitation,—this is due in a measure to the artificial coloring, that has been used in the specimen.

Q. 87. Can you quote any living authority as unfavorable to the use of coal tar dyes in this connection?

616 A. There is some uncertainty as to the therapeutic action of some of these dyes and Allen, in his Commercial Analyses, Alfred H. Allen, one of the celebrated English authorities, cautions against the use of at least one of these dyes, namely, napthalene yellow or napthol yellow, which is sometimes used for coloring food articles yellow, because of its marked poisonous character, which makes it very unfit. He states "that comparatively small doses of naphthalene yellow are said to cause asthmatic breathing, a considerable rise of temperature, convulsions and ultimate death." These are among the reasons which I think have rather deterred pharmacists from using coal tar dyes to any extent in medicinal preparations.

The suspending agents reported in these ten specimens submitted: Mucilage of quince-seed is very prone to fermentation, soon becoming mouldy and acid.

The evils resulting from acidity I have already pointed out.

Tragacanth gum is peculiar in that it will not make a clear solution except under conditions which preclude its use here as a suspending agent. The gum simply continues to swell and swell and will not yield a uniform preparation but one that is characterized by small masses of swollen cells and nodular-like separations.

Gelatine which has been mentioned, is objectionable as a suspending medium because, if used in sufficient quantity to exert a proper suspending value, it is prone to gelatinize and separate out as a jelly-like separation or gelatinize the preparation into a jelly-like mass. If in insufficient amount to produce a jelly, then it is apt to separate out in small gelatinous masses which are not only unsightly, but render the preparation non-homogeneous and of uneven thickness

in pouring. Gelatine is likewise over prone to undergo a decomposition with the development of disagreeable, gluey odor and taste.

Gum acaca, as I have already stated, is normally acid, so
617 that we at once introduce an acid in our suspending medium. It is very prone to undergo further acid fermentation with increase of acidity, which would dissolve more of the quinine, and make a preparation containing acacia in the presence of quinine more bitter as the acid fermentation develops and the amount of quinine in solution increases, so that acacia cannot be looked upon in my opinion as a proper suspending medium for quinine sulphate.

Dextrine, which has likewise been mentioned, is likewise prone to undergo acid fermentation, is objectionable because of its stickiness, yielding a preparation that pours like stationery mucilage, and a taste which is far from agreeable.

Starch, which is one of the mediums reported, yields with water a paste which will not remain homogeneous. It very soon becomes unevenly liquified, oxidation appearing to quickly take place, with some portions becoming liquid, and other portions remaining in a semi-pasty condition. As this oxidation continues in starch paste, there is developed an acidity and likewise a tendency to a mouldy, sour taste, so that the taste becomes objectionable, and the acid would dissolve the quinine, and make a preparation containing such a starch paste decidely bitter.

Irish moss mucilage, which has been mentioned, is subject to a very serious objection in that it would separate out and into an uneven, jelly-like mass, as shown in this sketch, and the preparation would consequently be far from homogeneous or an evenly distributed or pouring preparation.

Q. 88. Will you explain why quinine sulphate when in solution becomes more bitter in taste than when in crystal form?

A. When in solution it is in such a physical condition that it is very readily absorbed by the mucous surfaces and then brought in contact immediately with the gustatory nerves in the mouth and throat.

618 Q. 89. What happens when it is in crystalline form and in suspension?

A. Then it is not in the form of solution where it is readily brought in contact with the mucous surfaces and the act of swallowing occurs before solution can be effected in the mouth, and consequently there is no bitter taste produced.

Q. 90. Does it pass to the stomach in crystal form?

A. Practically reaches the stomach in a crystalline form.

Q. 91. State whether or not you found yerba santa in each and every one of these 10 Bibbins' specimens?

A. There was yerba santa in each of these 10 specimens that I examined.

Q. 92. And yet all of these specimens were bitter to the taste when you tasted them?

A. They all showed bitterness to the taste.

Q. 93. Mr. Bibbins testified as follows:

"Q. 8. As I understand these samples are in all respects the same as Coco-Quinine except that another syrup has been substituted as the coloring and flavoring medium in place of the chocolate syrup; is that correct?

A. That is right."

Have you anything to say in regard to that question and answer?

A. I would not consider them as pharmaceutically and therapeutically the same as Coco-Quinine.

Q. 94. In answer to X Q. 24 Mr. Bibbins testified that the ingredients he had put into his 10 respective samples played the part of a chocolate or coco as the suspending agents; what have you to say as to that, how successfully did they play that part?

A. As I have pointed out in my testimony, regarding each one of these specimens, I have shown that the suspending medium
619 in every case was deficient, did not serve the same purpose as the chocolate itself in the quinine-chocolate serves.

Q. 95. Is there anything to be said about the use of three ingredients in any preparation when one would be equally good by itself; is the multiplication of ingredients considered undesirable in pharmaceuticals, I mean for suspending or coloring or anything else?

A. As a rule we look upon the use of two or more articles where one will answer the purpose as objectionable, because it is prone to introduce two articles of different composition which may start decomposition per se between themselves or render one or the other subject to a change. As an example, I may cite that it is well known that mixtures of oils become rancid much more quickly than the pure oils themselves. That is a typical example of a change that is apt to take place in two perfectly stable articles when they are mixed, which are perfectly stable when kept by themselves in a pure state.

Q. 96. Mr. Bibbins has testified that in the Bibbins sample No. 9 there was present cassia, peppermint, wintergreen, gelatine, tragacanth and naphthol yellow 3, making six ingredients, and the ingredients in Quin-Coco take the place of those six?

A. Cassia, peppermint, wintergreen, gelatine and tragacanth—chocolate takes the place of those ingredients mentioned as being constituents in No. 9. Yerba santa is found both in No. 9 and in Quin-Coco and Coco-Quinine.

Q. 97. You have given your opinion as a pharmacist as to the value of these Bibbins samples in a commercial sense and pharmaceutically; I understand that you have been a manufacturing druggist as well, have you not?

A. I have had some experience in that line and am having some experience in that line.

Q. 98. You are a manufacturing druggist?

A. Yes.

620 Q. 99. And have been always?

A. Always engaged more or less in manufacturing pharmaceutical work.

Q. 100. How far would your opinion based on your experience as

a manufacturer confirm your opinion based on your opinion as a pharmacist, as to the value of these 10 Bibbins specimens?

A. In my opinion as a manufacturing pharmacist, none of these formulas would be acceptable as a marketable product.

Q. 101. What power has your microscope with which you made your examination?

A. The magnification was about five hundred times.

Mr. Rawle: Counsel for defendant offers in evidence the 10 sealed specimens, numbered from 1 to 10, taken from Bibbins' samples numbered 1 to 10, and also the 10 open bottles of specimens, the contents of which the witness testified that he examined.

Marked respectively "Defendant's Exhibits, Bibbins' specimens, 1 to 10, sealed," and "1 to 10 unsealed."

Direct examination closed.

Cross-examination.

By Mr. Bradford:

X Q. 102. I note that during your direct examination you have had before you a typewritten document and that counsel for defendant has also had before him what is apparently a copy of said document; will you please state what the document is?

A. The document is a copy of my study of the samples that were presented to me for examination.

X Q. 103. Your report?

621 A. Not exactly a report. It is a copy of my study of these 10 specimens of the 10 Bibbins samples. I would not trust my memory six or eight months after making the examination, made in January, to testify in June as to the result, and as I examined each one, I made a notation and typewrote it up as a record of the examination, as my record of the examination made of these specimens of the samples.

X Q. 104. When was this examination made?

A. The specimens were handed me in December and the examinations were made during the month of January.

X Q. 105. When was this memorandum made?

A. The memorandums were made in January, 1917.

X Q. 106. Have you observed the specimens from that time to the present?

A. These specimens were returned to Mr. Rawle and had been out of my possession until today.

X Q. 107. I note that in nearly all of the samples or specimens of the Bibbins samples, you have found that there has been more or less precipitation; by this do you mean precipitation of the quinine or the suspending medium, or both?

A. The precipitation does not appear to be in one uniform substance throughout. In some cases it is the resinous matter of the flavoring, in others it is a separation of the coloring, in others it is a separation of the suspending material, like the Irish moss or

gelatine or starch, in other cases, it is some separation of the quinine, as in the one where the coffee is used, so that there is no uniformity in the character of the separation.

X Q. 108. Is it not true that the bitterness found in these specimens is due to the fact that the quinine crystals have to a more or less extent gone into solution?

A. Undoubtedly the bitterness is due to the quinine having been changed from crystal into more or less a state of solution.

662 X Q. 109. Where the solution has been least, the bitterness is likewise the least perceptible?

A. Yes, that is axiomatic almost.

X Q. 110. Then in using the phrase, as you did in your answer to the question respecting specimen No. 3, "increasing the bitterness," you merely meant increase the solution or the extent of the solution of the quinine crystal?

A. I don't recall just how I used that word in connection with No. 3, but if I understand you right, there is no question that as acidity increases, the amount of quinine in solution increases, then consequently the bitterness increases. They go together.

X Q. 111. The forming of sediment in the bottom of the bottle, or on the side of the bottle, or the precipitation, as I understand you, is an objectionable feature to these Bibbins samples as shown by your examination of the specimens?

A. Pharmaceutically that is a strong objection.

X Q. 112. Is it not true that many pharmaceuticals show a precipitation in the containers or a sediment in the bottom or on the sides of the bottle, and is this not true both of Quin-Coco and Coco-Quinine?

A. Your reference to many pharmaceutical preparations I will answer this way, that it is true that some pharmaceutical preparations precipitate some of the fluid extracts, some of the tinctures, but those are preparations in which the precipitation is usually inert material, which we allow to settle and then decant the preparation off or filter off before the preparation is used as a medicinal agent, so that the process of filtration or clarification comes in there before the product enters the market or enters consumption. Your suggestion regarding Coco-Quinine and Quin-Coco,—a separation there is not a distinct precipitation, and there may be a little thickening along the sides or around the mouth of the bottle where the cork has been taken out, and so on, but there is not a distinct precipi-

663 tation such as we understand precipitation to mean in fluid extracts and tinctures and in the preparations that I have pointed out here.

X Q. 113. Referring for example to your specimens of samples No. 2 and No. 5, in comparing these with Coco-Quinine and Quin-Coco, which of the preparations would show the greater sedimentation on the container?

A. Both of these show a different character of sedimentation separation. The consistency is not identical and there is a different character of separation.

X Q. 114. Compare them with Quin-Coco and Coco-Quinine?

A. They are so distinctly different in viscosity and everything else that it is hard to make a comparison, but in the Coco-Quinine you do not get the separation such as you get here.

X Q. 115. I have noticed on many pharmaceutical preparations, a label, "Shake well before using"; what is the purpose of this label or caution on the outside of the bottle?

A. On prescription bottles that is a common thing to do where there is danger of any change taking place or a precipitation. In some of the articles where there is a liquid and a suspended insoluble powder, we have to do that and always do it so as to get a thorough distribution of the medicinal agent before it is either dispensed or administered.

X Q. 116. Would it not be quite feasible to use preparations such as the samples I have just shown you by having them "shaken well before using"?

A. It might be done, but in my opinion it would be very objectionable in a quinine preparation.

X Q. 117. Why is it done in the case of Coco-Quinine and Quin-Coco?

A. I don't know, excepting that as I said, there is apt to be a thickening around the top of the bottle from opening and closing, but there is not a precipitation such as we have in these preparations here, there is not the separation of the suspending media.

624 X Q. 118. Would there not be the same therapeutic effect, for example, from administering this medicine or medicine like these samples, and in administering Coco-Quinine and Quin-Coco?

A. Simply the effect that the quinine produces would be the same, no matter how it was administered, whether you administered it in the chocolate syrup or in this syrup, the effect of the two grains of quinine therapeutically would be the same in any way it was administered.

X Q. 119. Is it not true that possibly, notwithstanding your objection to the green color of Specimen No. 5, it might appeal to the taste of others and perhaps the flavor as well?

A. In my experience I would say no. In my opinion it would not appeal to the taste of other people.

X Q. 120. Personally I think the green is very pretty, you think it very bad, and I was surprised when you objected to the color of this specimen, because since I saw it I thought it was the most attractive of all. Is it not posible that what is true of the color might also be true of the flavor, and as tastes of people differ, that popularity might depend upon the tastes of the majority?

A. In my opinion the majority would not select that preparation, artificially colored, bitter, and suspended in mucilage of quince-seed, which is undergoing change continuously.

X Q. 121. The bitterness in that preparation, as you have already stated, is caused by the quinine crystals passing into solution. Suppose the ingredient which attacks the quinine crystals and caused them to dissolve in that solution were omitted and something sub-

stituted which would not have that effect; would it not then be a good preparation?

A. I only know of one preparation or one article that appears to serve the purpose. If you omit your suspending ingredient there you have no preparation.

625 X Q. 122. But there are other suspending mediums that might be used, are there not?

A. We have examined all those that have been suggested, and there is nothing before me to change the opinion I gave in my direct testimony, that chocolate was the only suspending medium that seems to answer the purpose. There is a colloidal nature about chocolate and its constituents that seems to serve this purpose in a way that nothing else, so far suggested, does.

X Q. 123. Is it not true that acacia and tragacanth are commonly used in pharmaceutical preparations?

A. Why yes, it is true that they are commonly used in pharmaceutical preparations.

X Q. 124. And acceptable?

A. For some preparations, not for all.

X Q. 125. Please define more exactly the meaning you intend to convey by the phrase "homogeneous suspension"?

A. The phrase "homogeneous suspensien" as I had in mind, referred to a liquid preparation which was uniform throughout, held, uniformly distributed throughout that liquid, some material, a medicinal preparation or medicinal agent, uniformly distributed or suspended throughout this liquid. If it is not even, it cannot be homogeneous. If it is not uniform, it cannot be homogeneous.

X Q. 126. Such preparations then would not require what is termed a "shake label"?

A. As a matter of precaution you might do it anyhow; as a matter of precaution you might do it.

X Q. 127. Did I understand from your testimony that you are now contending that the flavoring mediums are the disguising agents for the quinine?

A. Only to a certain extent, not solely.

X Q. 128. But notwithstanding the presence of yerba santa in these specimens of the Bibbins samples, you still found bitterness; I gathered from this and the answers to the previous ques-

626 tions, that these flavoring extracts or mediums were regarded by you as a disguising agent; and that yerba santa does not serve as a disguising agent?

A. I did not testify that at all. My understanding is that the yerba santa and the flavorings associated with the yerba santa were there alike as disguising agents jointly for that purpose.

X Q. 129. Are there no coal tar derivatives that are regarded as safe for medicinal purposes?

A. There are lots of them that are used medicinally.

X Q. 130. Are there any coal tar dyes that are used as medicinal agents or for medicinal purposes?

A. Yes, there are one or two coal tar dyes that are used as reme-

dial agents, but I believe largely, if not commonly, external applications.

X Q. 131. Can you name any?

A. Yes. The scarlet red is a commonly used medicinal agent used in the form of ointment or oily base for external application. Some of the various methylene blues have been used for certain kidney troubles. That has been used occasionally internally. There have been some of the other dyes used largely for diagnostic purposes, but the use of coal tar dyes, as I testified, used by the pharmacist, is not encouraged, and we select other agents, vegetable or inert animal, for coloring our pharmaceutical preparations.

X Q. 132. Respecting the specimens you have examined, their bitterness has been caused by deterioration, is not that true, since they were prepared?

A. Not in all cases. If I am permitted to explain, those that contain acacia, were started with an acid medium which would bring out the bitterness at once. In the others probably the deterioration of the suspending medium would account for the acidity.

X Q. 133. May it not be that the flavoring medium used as well as the suspending medium, would cause this deterioration?

627 A. In my opinion not. The flavoring was not there in sufficient quantity to cause an acid reaction, and the aromatic oils, the aromatics like ginger, all prevent acidic fermentation rather than encourage it, so that in my opinion the bitterness present could not be traced to the flavorings.

Deposition Closed.

The meeting adjourned until Saturday, June 9th, 1917, at 9 o'clock a. m.

June 9, 1917, Same Place.

Present: As before.

CHARLES S. ROGERS, recalled for further examination on behalf of defendant in sur-rebuttal, under the order of the Court.

By Mr. Rawle:

Q. 1. Are you the Charles S. Rogers who has previously been sworn and testified in this case?

A. Yes, sir.

Q. 2. What is your present home and territory?

A. Grand Rapids, Michigan, home; territory the same, Michigan.

Q. 3. All of Michigan?

A. A part of Michigan. Of course, my territory has been changed. I formerly had Saginaw in my territory. I left that territory which included Saginaw in June, 1914; was about my last trip in Saginaw.

Q. 4. Did you deal with Martin A. Kessel, a druggist of Saginaw?

A. Yes, sir.

Q. 5. How many calls did you make on him?

A. I was there not to exceed three or four times. He was
628 not in business when I made the territory first. He was a new druggist.

Q. 6. Martin A. Kessel, when testifying as a witness on behalf of plaintiff, testified as follows (p. 961):

"Q. 4. Among other items, did Mr. Rogers solicit your order for an item called Quin-Coco, and if he did, what did he say to you about its preparation?

A. Yes, he did. He said it was very similar to Coco-Quinine and had the same amount of quinine in it, two grains to the teaspoonful, and that it could be sold as Coco-Quinine; that the price of it being much lower than Coco-Quinine it would be more profitable to use it.

Q. 5. About when was this, or if the same representations were made at different interviews, how many were there and when did they occur, approximately?

A. The first time about three years ago and at intervals of four months. On each occasion he would make the same remarks about Coco-Quinine and Quin-Coco."

Please state whether or not these statements of Kessel are true or otherwise, and testify as to each one of them.

A. Yes, I did solicit his order for Quin-Coco. I said that it was a similar preparation to Coco-Quinine, had the same amount of quinine in it, two grains to the teaspoonful, but I did not say that it could be sold as Coco-Quinine, because this man had already used the preparation before and it was not necessary to say that. I sold this man, I remember very distinctly, five assorted gallons, and I had four gallons of specialties down, that is, four Warner specialties, and we had gone by the Quin-Coco, because he told me, he said "I am
629 buying everything that I can of my brother, Otto Kessel, that travels for the Michigan Drug Company," and I passed the Quin-Coco and we had the four gallons and could not find another gallon, and he voluntarily says, "Put me in a gallon of the Quin-Coco." That was the incident. His brother was financially interested in the store, in fact started him in business, and he was under obligations to him, of course.

Q. 7. What is the significance in respect to Coco-Quinine or Quin-Coco of the fact that his brother was a salesman for the Michigan Drug Company? What bearing had that on the situation?

A. It was a similar preparation and he could buy it of the Michigan Drug Company instead of us. He voluntarily gave me the order.

Q. 8. Why do you say you knew that he could buy a similar preparation from his brother, who represented the Michigan Drug Company? What is the significance of that?

A. I do not quite get you there.

Mr. Bradford: In order to save time, Mr. Rawle, all that you want to appear is that the Michigan Drug Company is a jobbing house and that, among other things, they handled the Lilly goods, and that

Otto Kessel, in traveling for the Michigan Drug Company, solicited orders for Lilly's line and not the Warner line; is that it?

Mr. Rawle: Yes.

By Mr. Rawle:

Q. 9. That is the fact, is it not?

A. Yes, sir.

Q. 10. I think you said that, knowing that, you passed by the item Quin-Coco in going over your Warner line?

A. I did, yes, sir.

Q. 11. Had Kessel, or any drug store in which he was employed, known of that Quin-Coco, or had he worked in a drug store where it was handled?

630 A. Yes. Richter handled it before and I think Fowley, of Bay City. Those were two places he worked before he started in business.

Q. 12. Please explain what you mean by a five-gallon order of Warner specialties?

A. When a man buys five gallons of Warner's specialties, we give the five-gallon price on each item. The only way that he could get that price of the ordinary house, our price, would be to buy twenty-five gallons. We give the five-gallon price when he buys five assorted gallons. With us five assorted gallons give the five-gallon price on each item.

Q. 13. When you reached the item Quin-Coco in going over your line, do you remember how much you dwelt on that item?

A. Nothing more than to explain the price, because this man already was acquainted with the preparation.

Q. 14. Please take up Kessel's answer to Q. 4 and see whether you have covered it all. I call your attention to what he said about price.

A. I explained to him that the price of our preparation would be $3.60 and the other $4.80. The matter did not come up as to how he should use it, because this man already knew the goods. The matter did not come up how he should use it. In fact, I am not a druggist. I am not in position to tell them what they are to do with it.

Q. 15. I now call attention to Kessel's answer to Q. 5 and ask whether Kessel's statement there is true or not?

A. I do not ever remember of selling him Quin-Coco more than once, because he had but little trade when he started out, was not doing a whole lot.

Q. 16. Had he just gone into business?

A. Yes. I sold him either the first or second time I called this gallon of Quin-Coco; either the first or second time that I called.

Q. 17. Will you state whether or not you have a clear and distinct memory of that particular interview?

631 A. Yes, sir, I do, of when I sold him the Quin-Coco.

Q. 18. I think you said that you had made two or three calls on him altogether after that first one. Do you remember what you said to him at any of those subsequent calls on the subject of Quin-Coco?

A. I do not think I said a word. He carried his gallons right along where you could see them, and if a bottle was very nearly full it was not necessary to say anything about it.

Q. 19. You mean on the shelves?

A. Yes, on the shelves.

Q. 20. Kessel testified specifically that you said to him that your Quin-Coco could be sold as Coco-Quinine. State whether or not you ever said that to him?

A. I did not.

Q. 21. Kessel, after testifying, in answer to Q. 97 and Q. 98, that he had been selling Quin-Coco over the counter and also by prescriptions with a Coco-Quinine label, further testified as follows (p. 966):

"R. D. Q. 46. In selling Quin-Coco as Coco-Quinine, and labeled Coco-Quinine, were you or were you not following the teachings and instructions of Mr Rogers in this respect?

A. I might say yes."

State what you have to say in regard to that testimony of Kessel?

A. I say that I never instructed him how to sell it or anything about it. The matter never came up as to how he was to dispose of the goods. He simply bought the goods along with the rest of our offer or order.

Q. 22. State whether or not you ever said to Kessel that he could sell your Quin-Coco to customers, or on prescriptions, labeled Coco-Quinine?

A. I did not. We have 14,000 items that we are offering
632 to the retail druggist, and we haven't time to spend on any one item going through our line.

Q. 23. Will you state whether or not you ever suggested to any retail druggist that he could sell any of your preparations for the product of another house?

A. No, sir, I have not. I do not consider it salesmanship. In fact, I never found it necessary in order to do business.

(No cross-examination.)

HENRY E. STARRING, recalled for further examination on behalf of plaintiff in sur-rebuttal, under the order of the Court.

By Mr. Rawle:

Q. 1. Are you the Henry E. Starring who has already been sworn and testified in this case?

A. Yes.

Q. 2. Is Saginaw in your territory, and if so, how long has it been?

A. Saginaw has been in my territory since the summer of 1914. I succeeded Mr. Rogers in this territory.

Q. 3. Did you know a retail druggist in Saginaw named William Heim?

A. Yes.

Q. 4. Did you solicit his business?

A. Yes.

Q. 5. Is Saginaw a good market for the quinine preparations an chocolate quinine preparations?

A. It is.

Q. 6. Have you called on all the druggists in Saginaw at differen times?

A. I call on the druggists in Saginaw on an average of three time a year. I have called on every druggist in Saginaw.

633 Q. 7. Do you know whether they stock Quin-Coco, som or most of them?

A. Most of them carry Quin-Coco in stock.

Q. 8. William Heim, a witness called on behalf of the plaintiff o rebuttal, testified (p. 957):

"Q. 4. What representations did Mr. Starring make about thi item (Quin-Coco) in soliciting your order for the same?

A. He stated that it was the same as Coco-Quinine; that the pric was less; that it flowed better, being a slightly thinner liquid, an that most of the boys were buying it and selling it in place of Coc Quinine."

Please state whether or not you told him that your Quin-Coco wa the same as Coco-Quinine?

A. I did not tell Mr. Heim that our Quin-Coco was the same a Coco-Quinine.

Q. 9. Please state whether or not you mentioned that the pric was less?

A. I showed Mr. Heim a number of liquid preparations whic we were selling and quoted the prices on them all.

Q. 10. State whether or not you told Mr. Heim that your Quin Coco flowed better than Coco-Quinine?

A. I did not tell Mr. Heim that our Quin-Coco flowed better tha Coco-Quinine.

Q. 11. Please state whether or not you told him "that most of th boys were buying it and selling it in place of Coco-Quinine"?

A. I did not tell Mr. Heim that the boys were selling it in plac of Coco-Quinine.

Q. 12. What did you tell him?

A. I told Mr. Heim that the druggists in Saginaw had a fin market for Quin-Coco and most of them were buying it.

Q. 13. State whether or not in your talk with Heim you referre to Coco-Quinine, Lilly?

634 A. I did not mention Lilly's Coco-Quinine in my talk wit Mr. Heim.

Q. 14. State whether or not you mentioned the "boys"?

A. I did not mention the word "boys." That is not my metho of speaking of my customers. I refer to them as customers or dealer

Q. 15. Will you state whether or not it is your practice, in tryin to sell Quin-Coco, to compare it with Coco-Quinine, and what you practice is?

(Objected to as not within the scope of the order of the Court; as not in any sense sur-rebuttal, and as merely calling for repetition of what the witness testified to when he was previously called in the case.)

A. It is not my practice, in selling Quin-Coco, to compare it with Coco-Quinine. My procedure is to include it and mention it along with a good many other items, and especially in a special offer we have on an assortment of five gallons.

Q. 16. What is the nature of that special offer?

(Same objection.)

A. The druggist in making up an assortment of five gallons gets the special price of a five-gallon quantity on each item.

Q. 17. Is that a considerable reduction?

(Same objection.)

A. It is a considerably better price than a single gallon.

Q. 18. Do you mean that the druggist, in taking a gallon each of five different preparations, gets the same low price on each as he would get on any one article if he bought five gallons of that one item?

(Same objection.)

A. Yes.

635 Q. 19. Have you had business with Martin A. Kessel, a retail druggist in Saginaw?

(Objected to on the ground that the order of the Court does not give defendant any right to examine this witness on any matter except respecting the testimony of William Heim.)

Defendant's counsel agrees that the reference to Kessel is not in the order of the Court, but suggests that plaintiff's counsel will not raise the question at the hearing, and that the Court will grant relief to defendant's counsel in not having inserted the name in the order.

A. Yes.

Q. 20. Did you solicit him regularly?

A. Yes, I have called upon him on an average of three times a year since I took the territory from Mr. Rogers.

Q. 21. Do you know whether he had always stocked Q. C.?

(Same objection.)

A. I knew that he had been carrying Quin-Coco in stock, because when I was given the territory copies of orders sold Mr. Kessel by Mr. Rogers were turned over to me, and I noticed that he had been buying Quin-Coco.

Q. 22. What was the question you put to him when you reached Quin-Coco in going over your list?

(Same objection.)

A. When I called on Mr. Kessel, I stated that our proposition of buying five gallons of assortments was still in effect, and quoted the prices on several liquid preparations, among them Quin-Coco.

Q. 23. Would you know whether or not his stock of Quin-Coco was low?

(Same objection.)

636 A. I would only know that his stock of Quin-Coco was low in case he stated so himself, or re-ordered it.

Q. 24. Would you ask him?

(Same objection.)

A. I usually ask the dealer or druggist if he can use any more of any particular item, in case he has purchased it previously.

Q. 25. Will you state whether or not Kessel ordered a gallon at a time of Quin-Coco, in connection with four gallons of other specialties?

(Same objection.)

A. Mr. Kessel has purchased Quin-Coco several times from me with the other gallon preparations, to make up the five-gallon assortment.

Q. 26. Martin A. Kessel, when called as a witness for plaintiff, testified (p. 961) as follows:

"Q. 4. Among other items, did Mr. Rogers solicit your order for an item called Quin-Coco, and if he did what did he say to you about this preparation?

A. Yes, he did. He said it was very similar to Coco-Quinine and had the same amount of quinine in it, two grains to the teaspoonful, and that it could be sold as Coco-Quinine; that the price of it being much lower than Coco-Quinine, it would be more profitable to use it."

Also (p. 962):

"Q. 11. Has Mr. Starring ever solicited your order for Quin-Coco, and if so what did he say to you about this preparation?

A. Yes, he did. He said the same thing that Mr. Rogers did."

Please state whether or not you told Kessel that your Quin-Coco was very similar to Coco-Quinine and had the same amount of quinine in it?

(Same objection.)

637 A. I did not tell Mr. Kessel that our Quin-Coco was similar to Coco Quinine and had the same amount of quinine in it, because I knew that he was already familiar with the prepara-

tion, having purchased it on previous orders, and no introduction was needed for the item.

Q. 27. State whether or not you said to him that it could be sold as Coco-Quinine?

(Same objection.)

A. I did not tell Mr. Kessel that Quin-Coco could be sold for Coco-Quinine, nor have I told this to any other dealer or druggist.

Q. 28. Have you seen Martin A. Kessel personally within a short time, and when?

(Same objection.)

A. I called on Mr. Kessel in January of this year.

Q. 29. State whether or not in your conversation with him at that time he made any reference to his having testified on behalf of the Lilly Company in this case, and if so what he said?

(Same objection and further as calling for hearsay evidence.)

A. Mr. Kessel told me at this time which I have just stated, in January, that he had been called as a witness in the Quin-Coco case and at the time he was rather confused and did not exactly realize what his testimony was.

Cross-examination.

By Mr. Bradford:

X Q. 30. Do you know Mr. Heim pretty well?

A. I know him quite well as a salesman calling upon him.

X Q. 31. How long have you known him?

A. I have known him since the year of 1914.

X Q. 32. And have been calling on him continuously since then, on your regular trips?

638 A. I have been calling upon him quite regularly, which averages about three times a year.

X Q. 33. Do you sell him goods right along?

A. I sell him a bill of goods, occasionally, but not every trip.

X Q. 34. What kind of a man is Mr. Heim?

A. He is a man with rather individual ideas.

X Q. 35. A man of good character?

A. As far as I know, he is.

X Q. 36. What is his reputation in the drug trade?

A. As far as I know, his reputation is all right.

X Q. 37. What is his reputation as a man and citizen?

A. I have never heard him referred to as being anything but a good citizen.

X Q. 38. Is it not a fact that he stands as high in the drug trade as any other druggist in Saginaw, both as a druggist and as a man?

A. I would not consider him the most successful druggist in Saginaw.

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X Q. 39. By successful, I presume you mean doing the largest business?

A. Yes.

X Q. 40. But is there any drug store in Saginaw that has a higher reputation than Mr. Heim's drug store? I mean now for that class of business and as a prescription store?

A. There are a good many there that would claim a higher reputation than Mr. Heim, if you asked them personally.

X Q. 41. I am asking you personally, for your opinion?

A. I consider there are several stores in Saginaw with better reputations than Mr. Heim has.

X Q. 42. What stores have a better reputation as drug stores than Mr. Heim's in Saginaw?

A. I would mention Schermer Bros.; Culver, Deisler Co.; A. A. Schott; Neuendorf & Schmeck; and many more that I might mention.

639 X Q. 43. How many drug stores are there in Saginaw?

A. I think there are about thirty.

X Q. 44. Is it not a fact that Mr. Heim, both as a citizen and as a druggist, commands the universal respect of the people of Saginaw and stands high in the community?

A. I do not know regarding this, because I do not live in Saginaw; but I should think, from my observations in calling there, that Mr. Heim is only known by a small section of the city, that section being the one in which he conducts his business.

X Q. 45. As to those that know him, is it not true that he stands well as a citizen and as a druggist, and commands their respect?

A. I presme that he does.

X Q. 46. Is a man whom you have ever found guilty of misrepresenting things to you in your dealings with him?

A. Our dealings have always been very satisfactory, neither one of us to my knowledge misrepresenting anything.

BENJAMIN FRANKLIN JONES, recalled for further examination on behalf of defendant in sur-rebuttal, under the order of the Court.

By Mr. Rawle:

Q. 1. Are you the Benjamin Franklin Jones who has already been examined in this case?

A. I am.

Q. 2. Do you know a man named John W. Culver, who testified that he had been in the drug business at Gulfport, Mississippi, and was, at the time he testified, a traveling salesman for a wholesale drug house?

A. Yes, sir, I do.

Q. 3. Was Gulfport in your territory for a number of years?

A. Yes, sir.

640 Q. 4. What is your territory?

A. Now New Orleans and the neighboring parts of Louisiana, Mississippi and Alabama.

Q. 5. Will you state whether or not Culver was a trained pharmacist or druggist?

A. No, sir, he was not.

Q. 6. What do you know about him?

A. He was a bookkeeper before he went into the business. He bought out an interest in the Parlor drug store in Gulfport. He was formerly a bookkeeper.

Q. 7. Was he acquainted with the drug business?

A. No, sir, not before he went in there.

Q. 8. Who ran the drug part of it?

A. He hired a registered man to run the drug department.

Mr. Bradford: This line of examination is objected to as having nothing to do with the matters testified to by Mr. Culver.

Q. 9. Did he do some or most of the buying for that Parlor drug store?

A. Yes, sir, he did the buying.

Q. 10. When you went over your line and got to the pharmaceuticals, what did he do?

A. He walked over to his shelf and he looked to see what line he had been buying from us, from Warner and Searle and Hereth, and such as he was short on he would give me an order for. He never asked me for one thing or another.

Q. 11. Would he call out the orders from where he stood at the shelf?

A. Yes, sir.

(Objected to as leading.)

Q. 12. How did he communicate orders for items as to which he was short, when he stood at the shelf?

641 A. If he would see a bottle was short, he would say "Give me so much of this."

Q. 13. Would he confer with his druggist in giving such orders?

A. Sometimes he would. He would ask the druggist "Do we use much of this or not?" and then give me the order.

Q. 14. Was there any preliminary discussion as to the merits of any of your items before he went to the shelf?

A. Not a bit.

Q. 15. Will you state whether or not you ever had a conversation with Culver about Quin-Coco?

A. I never did. He not being a druggist, I could not converse with him about pharmaceuticals, because he did not know anything about them.

Q. 16. How long have you been connected with the Pfeiffer Chemical Company and the defendant continuously?

A. Ever since the Pfeiffer Chemical Company started in business, which was about 1904.

Q. 17. And then you kept on with Warner & Company when it was formed?

A. Yes, sir.

Q. 18. In substantially the same territory all the time?

A. Yes, sir.

Q. 19. John W. Culver, when testifying for the plaintiff in rebuttal (p. 775) testified in answer to Q. 4 that you said to him that your Quin-Coco was absolutely identical with Coco-Quinine and could be used in its stead. State whether or not his statement is true?

A. I never told him it was identical, or did not tell him it could be used for Coco-Quinine, because I had no conversation with him about it.

Q. 20. Culver further testified (p. 776 Q. 8) that you told him it could be dispensed in place of Coco-Quinine and represented
642 that neither the doctor nor anyone else could tell the difference between Quin-Coco and Coco-Quinine. State whether or not that statement is true?

A. It is absolutely not true. I never told him or anyone else that they could use it for Coco-Quinine, or that it was absolutely certain it was exactly the same thing. I never had any conversation with him about it at all.

Q. 21. State whether or not you ever told him, or anyone else, that neither the doctor nor anyone else could tell the difference between them?

A. No. That is not my way of selling goods. I do not tell a man that sort of thing.

Q. 22. Culver testified, in effect, that you told him that Quin-Coco could be dispensed in place of Coco-Quinine, and that neither the doctor nor anyone else could tell the difference between them, on physicians' prescriptions for Coco-Quinine and on general counter calls for Coco-Quinine. State whether or not this statement of Culver is true?

A. Absolutely not.

Q. 23. Culver testified that your statement on the witness stand that you never told a man that he could substitute is absolutely at variance with his experience of you. What have you to say as to this? Have you ever told a man he could substitute?

A. Never told Mr. Culver or anyone else that he could substitute. I do not use the word "substitute" in selling my goods.

Q. 24. Culver further testified (p. 780, in answer to X Q. 28) that the substance of your remarks to him in regard to Quin-Coco and Coco-Quinine was that the two preparations were identical and that Quin-Coco could be used in place of Coco-Quine. State whether or not this is true?

(Objected to as mere repetition of what the witness has already said several times.)

643 A. Absolutely not.

Q. 25. Culver further testified (p. 782, in answer to X Q. 36) that the gist of your remarks was in the use of the words "identical" and "substitution" in connection with Coco-Quinine in your conversation with him. State whether or not you ever used those words in regard to Quin-Coco and Coco-Quinine in talking to Culver?

A. I never used the words "identical" or "substitution" to Mr.

Culver or anybody else, and never had any conversation on Quin-Coco with Mr. Culver. He not being a druggist, I could not converse those things with him.

(No cross-examination.)

HENRY J. RITAYIK, recalled for further examination on behalf of defendant in sur-rebuttal, under the order of Court.

By Mr. Rawle:

Q. 1. Are you the Henry J. Ritayik who has already been sworn and examined in this case?

A. Yes, sir.

Q. 2. How long have you been working for the Warner Company or its predecessors, the Pfeiffer Chemical Company?

A. About ten years.

Q. 3. Have you ever called at a drug store where John Moise was employed as a clerk, at Napoleonville, Louisiana?

A. Yes, sir.

Q. 4. Whose drug store?

A. Mr. Heno's.

Q. 5. How often?

A. Just once.

Q. 6. About how long ago with reference to anything which enables you to fix the date?

644 A. I would say it was during the time that they were about to put the stamps on, those revenue tags; about the time the stamps were put into effect, about that time.

Q. 7. Will you state whether or not the call and the circumstances and the surroundings are clear to your mind?

A. As I remember, the store had a counter that we open up sample cases on right near the prescription case, and a soda fountain in front near the door.

Q. 8. Do you remember Moise personally?

A. Yes, sir.

Q. 9. Did you solicit a sale from Heno?

A. We worked the general line.

Q. 10. Did you do the talking.

A. Most of it.

Q. 11. John Moise testified as a witness in rebuttal, on behalf of plaintiff (p. 869 in answer to Q. 14) that you said to Heno in his presence that everybody along the road were using Quin-Coco, when the doctors prescribed Coco-Quinine, as they could not tell the difference. Please state whether or not this is true?

A. I would say that that is an absolute falsehood. To him or to any other druggist in the United States it has never been said.

Q. 12. Do you remember what was said at that interview?

A. There was no doctors brought in specially. It was put on this basis: I told Mr. Heno in the way of pharmaceuticals that a good many druggists throughout the United States were in a way doing

their own detail work, getting the consent of the doctor to use such prescriptions that they did their own personal detail work on.

Q. 13. Go ahead.

A. That about covers that point.

Q. 14. Please connect that statement up with the matter before us.

A. I do not understand just what is meant there. I do not
645 know now. You have got me a little in the air.

Q. 15. What bearing had it to say to Heno that druggists were doing detail work considerably?

A. On different products in the way of pharmaceuticals as a whole, and getting the consent of the doctor to use such products in their prescriptions that they done their own personal detail work on. That is the way I made the statement at first.

Q. 16. He further testified (p. 870, in answer to Q. 15) that you said to him that the druggists were using Quin-Coco all over on their prescriptions for Coco-Quinine and that you could not detect the difference. State whether or not this statement of Moise is true?

A. It is not true.

Q. 17. State whether or not you said anything of that sort to Moise?

A. Not along that line, no, sir.

Q. 18. Moise further testified (p. 872, in answer to X Q. 33) that you said to him that the druggists were using Quin-Coco for the same thing as Coco-Quinine. Will you state whether or not that is true?

A. That is not true.

Q. 19. Moise further testified (p. 873, X Q. 47) that he understood you to say that Quin-Coco is just like Coco-Quinine therapeutically. Will you state whether or not you gave him so to understand, or said anything to him to that effect?

A. No, sir. I simply said to him, like to every other druggist when they bring up that point, that it contains two grains of quinine sulphate. That is my answer.

Q. 20. Invariably?

A. Invariably, yes, sir.

Q. 21. Moise testified (p. 873, X Q. 48) that he understood you to say that the druggists all over were using Quin-Coco in prescriptions calling for Coco-Quinine, or susbstantially to that effect.
646 Please state whether or not you ever said anything which justified him in having that understanding?

A. No, sir.

Cross-examination.

By Mr. Bradford:

X Q. 22. You are still working for the William R. Warner Company?

A. Yes, sir.

X Q. 23. Have you been working for them all the time since you last testified in the case?

A. Yes, sir.
X Q. 24. In the same position that you occupied then?
A. Yes, sir.
X Q. 25. Assistant sales manager?
A. Assistant sales manager.
X Q. 26. You explained to Mr. Heno, you state, about the methods of detail work employed by other druggists?
A. By a good many druggists.
X Q. 27. Have you made this explanation to other retail druggists?
A. Yes, sir.
X Q. 28. Name some of them?
A. Offhand I could not.
X Q. 29. You only remember specifically Mr. Heno?
A. Well, no; the point is that it is my general conversation with different druggists. That is the way I will put that.
X Q. 30. Can you name any retail druggist, aside from Mr. Heno, on whom you have called, to whom you have made such representations?
A. As I say, to the trade in general.
X Q. 31. I understand you to say, then, that since you last testified as a witness in this case you have been continuously in the employ of William R. Warner & Company and in the same capacity
647 that you occupied at that time?
A. I will say this, that I still do the same work. I have the title of sales manager, but it is practically the same work.

SAMUEL J. HAGAMAN, recalled for further examination on behalf of defendant on sur-rebuttal, under the order of Court.

By Mr. Rawle:

Q. 1. Are you the Samuel J. Hagaman who has previously been examined in this case?
A. I am.
Q. 2. Do you know Charles S. Lebo, who has testified in this case that he had been a clerk in Bell's drug store in Reading?
A. Yes, sir.
Q. 3. How many calls did you make on the Bell drug store?
A. I would say about five.
Q. 4. Do you remember about what year?
A. I cannot remember.
Q. 5. Several years ago?
A. Yes.
Q. 6. Did you ever see Charles S. Lebo at that store?
A. Yes, sir.
Q. 7. Charles S. Lebo, when called as a witness for plaintiff, in answer to Q. 6, on page 656, testified that in selling Warner goods you seemed to lay great stress on the fact they could be sold in preference to higher priced articles of the same kind and could be used in substitution. State whether or not that statement is true and whether you ever said that, or anything similar to it?

A. I never did.

Q. 8. Lebo further testified (p. 657 in answer to Q. 12) that at interviews with you, from four to eight years before he testified, you had given him the impression that the Bell Drug Store could substitute Warner's line of pills A. B. S. & I. for Lapactic Pills and Triloids for Diamond Antiseptics, and that the druggist could substitute these two items of Warner for the others. Please state whether you ever said anything to Bell, or in the hearing of Lebo, to justify that impression?

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A. I never said anything like that.

Q. 9. Did you know, when you called on the Bell Drug Store, whether they kept in stock the pill known as A. B. S. & I.?

A. Yes, sir, they had on hand the pill A. B. S. & I., which was sold by a previous salesman.

Q. 10. State whether or not this was true at all your calls, that they had this pill on hand?

A. It was.

Q. 11. Will you state whether or not it would have any influence on your sales talk to a druggist, that he was already carrying a given article of which you were trying to sell him an additional supply?

Objected to as incompetent, immaterial and irrelevant.

A. I would say it would not be necessary to talk to him at all, other than to ask him how his stock was.

Q. 12. What was your practice in such case?

Same objection.

A. To ask the man how his stock was of the pill A. B. S. & I.

Q. 13. Was this universally your practice?

Same objection.

A. Yes, sir.

Q. 14. Do you know whether he stocked your Triloids when you called upon him?

Same objection.

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A. I am not sure of that.

Q. 15. Do you know whether your Triloids were similar in appearance and shape and all that sort of thing to the Diamond Antiseptic?

Same objection.

A. No, sir.

Q. 16. What was the shape of your Triloid?

Same objection.

A. Triangular.

Q. 17. What was the shape of the Diamond Antiseptic?

Same objection.

A. Diamond shape, four-cornered.

Q. 18. What other differences were there between Triloids and Diamond Antiseptics, besides shape of the article?

Same objection.

A. I would say it was a different made tablet. The Diamond Antiseptic is a molded tablet. The triangular tablet, otherwise Triloids, is a compressed tablet.

Q. 19. Will you state whether or not these differences between the two articles are readily noticeable by a buyer?

Same objection.

A. Yes, sir.

Q. 20. How long have you been working for the Warner Company or its predecessor?

A. I would say more than 20 years.

Q. 21. Were you under the old Warner management?

A. Yes, sir.

Q. 22. Did you know Samuel H. Bell, of the Bell Drug Store, Reading?

A. I did.

Q. 23. Bell, when called as a witness for plaintiff in rebut-
650 tal testified (p. 622), in answer to Q. 10, that you never came to call on him by yourself; is that true?

A. It is not true. I may say that I called on Mr. Bell at least once by myself, when I was looking to locate a salesman for the territory.

Q. 24. Bell also testified in the same answer that in trying to place an order for his line, you would place great stress on naming this, that or the other article which would be a good substitute for one of the standards; for instance, your A. B. S. & I. pill would be a good pill to replace the Lapactic, and your Elixir and Caffein Comp. to replace panpeptic Elixir. Will you state whether you ever, in selling to Bell, stated that your articles named would be a good substitute for corresponding articles of another house?

A. I never did.

Q. 25. Bell testified (p. 665 in answer to X Q. 22 and X Q. 23) that it was deceptive drug dealing for a druggist, when a doctor writes a prescription for panpeptic Elixir, to give him Warner's Elixir of Pepsin and Caffein Compound, and that that is what you said to Bell that he could and would do. State whether or not those statements of Bell are true?

A. Not true.

Q. 26. State whether or not you ever said anything similar to that, or corresponding to that, or relating to that in any way?

A. I never did.

Q. 27. Bell testified, in answer to X Q. 24, that he told you that he never allowed that practice in his drug store. State whether or not Bell ever said that to you?

A. He never did.

Q. 28. Bell testified in answer to X Q. 24 that he had refused you

an order because he was disgusted with you and that that was your last visit to him. Will you state what occurred at your last interview with Bell and whether you had any trouble with him then?

A. On my last visit to Mr. Bell I remember he told me that
651 he was sick and tired of the drug business, and he said, "I think I will sell out."

Q. 29. Have you a clear recollection of that last call and what was said?

A. Yes, sir.

Q. 30. Will you state whether he was pleasant to you on that last call?

A. Decidedly not.

Q. 31. What reason did he give for not buying any goods from you?

A. I repeat that Mr. Bell said that he thought he would sell out, and his wife had died and he was all broken up, did not care about anything. In fact, he told me that he felt so bad he thought he would put himself out of the way.

Q. 32. Will you state whether or not there was an occasion on which he was a little unpleasant with you, followed by a subsequent occasion on which he was more pleasant and bought goods?

Objected to unless it relates to the facts concerning which Mr. Bell testified as a witness for plaintiff.

A. I remember nearly all my visits with Mr. Bell. I remember that I called on him on one particular occasion on which I did not sell him, and on the following trip did sell him. On the last visit that I made to Mr. Bell I did not sell him. As I testified previously, he told me that he was all broken up and that he would get out of the drug business and end his life, and as I remember I had a statement of his account.

Q. 33. Was there any occasion on which he had been unpleasant to you, followed by a subsequent visit in which he bought goods from you?

A. Yes, sir.

Mr. Bradford: This line of examination is objected to as clearly not within the authority of the order of the Court, and as in-
652 competent, immaterial and irrelevant at this time. The questions should be confined to facts testified to by Mr. Bell.

By Mr. Rawle:

Q. 34. State whether or not at your very last visit at Bell's Drug Store, he refused you any order because he was disgusted with your selling methods?

Mr. Bradford: The question is objected to unless the time of said last visit is indicated as the one to which Mr. Bell referred in his testimony.

A. If he was disgusted with my selling methods, I never knew it.

Q. 35. Did he say anything of that sort to you at your last visit?

Same objection.

A. No sir.

Q. 35. Did you know Earl S. Peabody, who used to be a Warner salesman?

A. Yes, sir.

Q. 37. Did you ever travel with him?

A. Yes, sir.

Q. 38. About what year?

A. I do not remember the exact year.

Q. 39. Peabody, when testifying for plaintiff in rebuttal, said in answer to Q. 15 (p. 674) that he had seen Mr. Hagaman offer the pill A. B. S. & I. as a substitute or replacer for Lepactic Pills; is that true?

A. Not true.

Q. 40. Peabody also testified in his same answer that you had offered your Alophen Pills as a substitute or replacer for the corresponding or similar pill of another house; state whether or not that is true?

A. Not true.

Q. 41. Did you give Peabody any instructions about the time he became salesman for the Warner house?

A. I instructed Mr. Peabody just like I instruct most of
653 the salesmen in the studying of our different catalogs, which of course includes the salesmen's Confidential. I of course worked with Mr. Peabody.

Q. 42. How long did you first take to instruct him about his duties?

A. That is hard to say exactly.

Q. 43. As much as an hour?

A. I would say more than an hour.

Q. 44. About what did you talk to him?

A. I talked with Mr. Peabody like I talked with all the salesmen that I worked with, on house policy, which is printed in the salesmen's Confidential; methods of collection.

Q. 45. You talked to him about the goods he was to sell?

A. That is talked about usually on the road and when selling the dealer.

Q. 46. Peabody testified (p. 676) in answer to Q. 31: "Q. There was no chief requisite that Mr. Hagaman impressed upon my mind any more than to make all the sales that I could." State whether or not that is true?

A. Mr. Peabody, like all our salesmen, was on a salary and commission basis. It is not necessary to call attention especially to selling goods, on account of our contract, which is co-operative.

Q. 47. What effect would the fact that he was selling partly on commission have upon his deal in making sales, in your mind?

Objected to as incompetent, immaterial, irrelevant, calling for mere matter of opinion, and not within the scope of the order of the Court under which this deposition is taken.

A. It would be stimulating.

Q. 48. Peabody testified (p. 685 X Q. 75) that he had on hi Warner list and was selling a preparation of iron, quinine an strychnine, and that he had instructions that it could be used whe another manufacturer's brand was specified. Please state whethe or not you ever gave him such instructions?

A. I never did. It would be ridiculous to do so.

654 Cross-examination.

By Mr. Bradford:

X Q. 49. You were present on yesterday, ready to testify?

A. Yes, sir.

X Q. 50. What time did you arrive at this office this morning?

A. Ten minutes past 11.

X Q. 51. You were in consultation with counsel for defendant Mr. Rawle and Mr. Baldwin, and also with Mr. G. A. Pfeiffer, durin the 25 minutes immediately prior to your coming into this room t testify, were you not?

A. Yes, sir.

X Q. 52. When was your last visit to Mr. Bell?

A. I do not remember.

X Q. 52. Have you any recollection whatever on the subject? Ca you approximate the date?

A. Within the last two years.

X Q. 53. Has it been within the last year?

A. I would say within the last two years.

X Q. 54. Can you say that it has not been within the last year?

A. I would say within the last two years.

X Q. 55. That is your best answer to my question?

A. My best answer as far as I can say, yes, sir.

X Q. 56. Is your recollection as clear on the other matters con cerning which you have testified as it is respecting the time of you last visit to Mr. Bell?

A. Just what matters do you refer to?

X Q. 57. The matters concerning which you have testified?

(X Q. 56 read.)

A. I would say it was as clear.

Adjourned to a date to be arranged between counsel.

655 *Depositions on Behalf of the Defendant in Surrebuttal Under the Order of the Court, Taken at the Office of Francis Rawle, Esq.,* 1004-07 *West End Trust Building, Philadelphia, Pa., at* 11.00 *o'clock a. m., July 5th,* 1917.

Present:

E. W. Bradford, Esq., for Plaintiff.
Francis Rawle, Esq., for Defendant.

Defendant's Testimony.

JOHN FIELDING WILSON, JR., a witness called on behalf of the defendant, having been duly sworn testified as follows:

By Mr. Rawle:

Q. 1. State your name, age, residence and occupation?
A. John Fielding Wilson, Jr., age 27, Atlanta, Georgia.
Q. 2. Your occupation?
A. I am a traveling salesman for William R. Warner & Company, the defendant, and I have been in that capacity since March 13th, 1916, I think—I am pretty sure it is March 13th, 1916—yes, that is right. My headquarters are at Atlanta, Georgia, and I have the Northern three-fourths of Georgia. I am a registered graduate druggist under the laws of Georgia. I was registered—I don't remember the year—I think it was 1910. I was registered the year before I was married, which was 1911. I have been in the drug business all these years, except for a few months—well, in fact I have been in the retail drug business—I was with Brown-Bigelow for a while—it was just a few months. I have been in the retail drug business all my life—I have been in the business ever since I have done
656 any work, except since I have been on the road for William R. Warner & Company. Since I was registered I have been in the retail drug business all my life except a short time I was with Brown-Bigelow, an advertising firm. I was in the drug business in Jacob's Pharmacy and Elkins Drug Company, both at Atlanta.
Q. 3. Do you know Ralph E. McCorkle, a retail druggist in Atlanta, Georgia, and how long have you known him?
A. I know him, but only saw him once.
Q. 4. With what druggist was he connected?
A. Atkins Drug Company, Atlanta, Georgia. He was a partner—I don't know that—he must have been a partner. He did the buying the last time I called there.
Q. 5. How many calls have you made at that drug store since you went into the employ of William R. Warner & Company?
A. Two.
Q. 6. Who did the buying for this pharmacy at the first call?
A. His partner.
Q. 7. Who did the buying at the second call?
A. McCorkle.

Q. 8. Have you a clear recollection of that second call?

A. I have.

Q. 9. Did you have with you at that call your demonstration book with the labels of your line pasted in it?

A. I did.

Q. 10. State what was said between you and McCorkle at this interview?

A. Well, we first talked up patents, then went into pharmaceuticals. I opened the demonstration book and came to each item as it is pasted in the book with the price written in pencil up-
657 side down so I can read it standing on the opposite side of the counter. Each item I came to I demonstrated its formula and its merits pharmaceutically. When we came to A. B. S. & I. pills, of which the formula was on the label in the book, I called the druggist's attention to the formula, saying that it was a pill that was made right and similar in formula to Sharp & Dohme lapactic pill; Lilly's A. B. S. & I. and, in fact, nearly every manufacturer made an A. B. S. & I. pill, and that our pill was not only properly coated and made right, but our price was only 85 cents a thousand, much less than any other pill of the same formula on the market.

When I came to glycerole thymol compound I called the druggist's attention to the fact that this preparation was a preparation containing benzoic acid, which was very high at the time; that it was a preparation which was absolutely made right, and as the formula was on the label, he could see it. This item was similar to Glyco antisepicus alkaline U. S. P. also glycothymoline, Cress & Owens, and all other glycothymoline antiseptic solutions, and on account of the price of benzoic acid being high, we were very fortunate in having a very good price on this item, that it was guaranteed, the quality of the item, to be perfect.

We came to the item, or the label in the demonstration book, Fluid Viburnum, S. & H. I called the druggist's attention to the formula on the label, which he had in front of him in the demonstration book, and I said to him, "Doctor, this preparation is one of our best—this preparation which is very similar to Hayden's Viburnum compound, cramp-bark compounds and most all Viburnum Opulus made, differing from some of them in not containing skunk cabbage, skull cap and squawvine. This preparation, Doctor, we can offer you at a very good price. This is a preparation that we have had on the market for a number of years, and it has enjoyed a great amount of success with the druggists and physicians
658 on account of its therapeutic value. This preparation we can offer you at a price, considering its quality, a great deal lower than any other viburnum upon the market."

There were a lot of other items which we came to in the demonstration book, which were demonstrated in the same way. We came to the label, "Quin-Coco," and I called the druggist's attention to the formula. I had a sample in my case which I showed him. I said, "Doctor, this is a perfect syrup of quinine with chocolate which we have had on the market for a number of years. As you

know, there are lots of preparations on the market of chocolate quinine, some of them sour in hot weather and some of them don't stand up for different reasons. We have got a preparation that is absolutely perfect in manufacture, and will not sour in hot weather, and guaranteed to be one of the best chocolate quinines on the market, containing two grains of quinine sulphate to the average teaspoonful, under a perfect chocolate syrup, and in that manner or that way it is very similar to nearly every chocolate quinine on the market, of which there are quite a few: Merrill's; H. K. Wampole's chocolate quinine, and a number of chocolate quinines on the market, and all we can claim for this preparation is the fact that it contains just what the label says it does and is a preparation made exactly right and guaranteed." We went into a few other labels in the line, demonstrated in the same way, and finally ended it on patents.

The Doctor seemed to be interrupted during this interview a great deal; seemed to be very worried about something and was just running from pillar to post. I had to nail him in the corner to get him to stand for my demonstration, and finally, we closed the patents, and I suppose the whole interview took up about 30 minutes, of which time most of the time was spent on patent medicine; very little taken by pharmaceuticals—in fact I did not try to sell any pharmaceuticals; we merely went through the
659 line. That is just about the end of it.

Q. 11. Ralph E. McCorkle, when called as a witness on behalf of the plaintiff in this case (p. 1144) testified that you were at his store in the first part of December, 1916, and "offered Quin-Coco as a substitute for Coco-Quinine, stating that it had the same appearance and same formula as Coco-Quinine." State whether or not that is true?

A. I asked him——

Q. 12. In answer to question 2——

Mr. Bradford: I wish it noted that the witness started to answer by saying "I asked him," when he was interrupted by his counsel, when he was asked to state whether or not that was true.

The Witness: In part it is and in part it is not. I was there sometime in December. I don't remember the exact date, but as far as my offering Quin-Coco as a substitute for Coco-Quinine, I did not. I merely called his attention to the preparation and its formula and said that it was a similar item to Coco-Quinine and all other chocolate quinines on the market. My argument was that we had the best preparation as before said, or one of the best, as before said.

By Mr. Rawle:

Q. In the same answer McCorkle testified as follows: "He said it could be used for Coco-Quinine to fill calls for Coco-Quinine, to be used as a substitute for it." State whether or not that statement is true?

A. Is that in A.—I did not say it could be used for Coco-Quinine or to be used as a substitute for Coco-Quinine. I only said what I said in my sales demonstration as to its guarantees and its quality, and called his attention only to its formula and that it was a similar item to nearly every chocolate quinine on the market of which
660 there were quite a few, and my sales talk was that we had a price on chocolate quinine below anybody else on the market, but not at half price.

Q. State whether or not you said to McCorkle at that interview that your Quin-Coco could be used to fill calls for Coco-Quinine?

A. I did not.

Q. 13. McCorkle testified that you told him that Quin-Coco was just like Lilly's Coco-Quinine. State whether or not that is true?

A. I did not tell him it was just like, but I told him similar to Merrill's Choc-Quin and the rest of them in the fact that it contained two grains of quinine sulphate to the average teaspoonful, and that the chocolate syrup——

Q. 14. McCorkle testified that you asked him if he carried Coco-Quinine, and that you said, "Yes," and then you said——

The Witness: He said, "Yes."

Q. 15. McCorkle in answer to X Q. 41 testified:

"He asked if I carried Coco-Quinine. I said 'yes.' He said 'I have it in Quin-Coco, being the same stuff under different name.'"

State whether or not this statement of McCorkle's is true?

A. I did not ask him if he carried Coco-Quinine. I knew he carried Coco-Quinne, and there was a possibility of him carrying Merrill's Choc-Quin and Wampole's Chocolate Quinine and most any other chocolate quinine, because chocolate quinine is sold very extensively in the South in nearly every manufacturer's brand.

Q. 16. Please notice that you have not fully answered my question. (Question read as follows: "McCorkle in answer to X Q. 41 testified: 'He asked if I carried Coco-Quinine. I said, yes. He said, I have it in Quin-Coco, being the same stuff under a different
661 name.' State whether or not this statement of McCorkle's is true"?)

A. I did not tell him I had Coco-Quinine under a different name. In fact, we did not do all this talking about Coco-Quinine or Quin-Coco either. There was only a very few minutes taken to the item, merely me explaining to him that Quin-Coco was as a chocolate syrup, containing two grains of quinine sulphate to the average teaspoonful, a very fine preparation at a very good price, and the argument was closed.

Q. 17. McCorkle (R. D. Q. 45) testified that you said that Quin-Coco "was the same stuff as Coco-Quinine." Is this true?

A. It is not. I said it was a similar item to Coco-Quinine, as it was also similar to Merrill's Choc-Quin and Wampole's chocolate quinine and other chocolate quinines on the market, in the fact that it contained two grains of quinine sulphate to the teaspoonful in the chocolate syrup.

Q. 18. McCorkle (p. 1145, Q. 2) testified as follows:

"That is about all about Quin-Coco. He had several other preparations I could tell you about that he offered as substitutes."

Q. 3. What other preparations?

A. A fluid viburnum as substitute for Hayden's Viburnum compound, and also Glycerothymol as a substitute for Glycothymoline, and also A. B. & S. I. pills as substitute for Lapactic pills, Sharp & Dohme. In fact, his chief talk in selling his pharmaceuticals was they were offered as substitutes for other preparations recognized as standards."

State whether or not you offered McCorkle your items which he mentioned as substitutes for the corresponding items of other houses as he there states?

A. I did not. I only offered them as similar items, not only in the case of Fluid Viburnum Compound, similar to Hayden's
662 Viburnum Compound and very similar to other compounds of cramp-bark, and that our preparation being made right, in the case of Glycerolthymol and A. B. S. & I. pills, which these two were similar to Glyco Antiseptic Alkaline, Glycothymoline, and any A. B. S. & I. pills, similar to Lapactics and all other manufacturers A. B. S. & I., that we had the price on these items, and that was what I wanted to interest him in concerning these items, the price, considering their quality.

Q. 19. McCorkle testified (X Q. 25) that you asked him if he carried Hayden's Viburnum Compound and was told yes. State whether or not that is true?

A. I did not ask him if he carried Hayden's Viburnum Compound, because I knew there is not a druggist in the South who does not carry Hayden's Viburnum Compound and nearly all other standard cramp bark compounds.

Q. 20. McCorkle in the same answer testified that you showed him a label of Fluid Viburnum and said it was the same thing at a cheaper price. State whether or not that is true?

A. When we were going through the demonstration book in the beginning, when we came to the label, "Fluid Viburnum Compound" I said as heretofore that it was a preparation of cramp-bark similar to Hayden's Viburnum Compound and all other cramp-bark compounds on the market, with some exceptions as I before stated.

Q. 21. If you know, please state whether these various Viburnum compounds of the different houses carry their formula and their ingredients on the label?

A. Nearly all of them do.

Q. 22. State whether or not Warner's do and whether or not Hayden's do?

A. Hayden's give the alcoholic strength and the fact that it is on the physician's circular, that is the Compound Viburnum
663 Opulus cramp-bark. Most all other preparations give the complete strength of each item of the whole formula and they are all very similar.

Q. 23. State, if you know the fact, whether all or most of the glycerolthymol products and the A. B. S. & I. products of the various houses carry their ingredients on the label?

A. I do not know of a single A. B. S. & I. pill that does not carry its definite strength of each ingredient on the label, Lapactics accepted—Lapactics, I think all—they have it on all.

Q. 24. What about Glycerolthymol Compound?

A. It has its constituents on the labels, its strength; Glyco Antiseptic Alkaline, Sharp & Dohme preparation, all have their formula of the pill, and on the physicians' circular. They are all very similar.

Q. 25. Do you know L. S. James, a retail druggist of Atlanta, Georgia?

A. I do.

Q. 26. Do you remember calling on him some time in May, 1916, to solicit his trade?

A. I remember some time in May calling on him, calling in the store that he was working in.

Q. 27. Did he do the buying?

A. He did part of the buying.

Q. 28. Who did the rest?

A. Well, he did the buying in my line.

Q. 29. Will you state what passed between you when you called on L. S. James in May, 1916?

A. When I called on him in May, 1916, I was really not soliciting an order, when I was out there, in a way. I went in and we talked and joked about lots of different things, not concerning business for ten or fifteen minutes. Then, I asked him how his stock of pepsin was and he told me he had plenty. I had my sample case open and I called his attention to Fluid Viburnum Compound, mentioning at the time that it was a similar preparation to Hay-
664 den's Viburnum Compound and nearly all the compound cramp-bark compounds on the market, and that we had a fine price of $4.05 a gallon in 5 gallon assortment, with which he was familiar. I asked him if he ever used Quin-Coco. He said, "No, what is it?" I pulled out the sample and gave it to him. I said, "Read that label. It is a chocolate syrup containing two grains of quinine sulphate to the teaspoonful in a perfect chocolate medium, guaranteed not to sour, at a cracking good price. It is very similar to Lilly's Coco-Quinine, Wampole's Chocolate Quinine and Merrill's Choc-Quin, and most all of the preparations of chocolate quinine on the market, and we have got the price on this item." With that, he said, "We don't use it," and we closed the argument right there. We mentioned A. B. S. & I. pills and I said "There is a pill cheaper than any other A. B. S. & I. on the market. It is similar to every one of them in the fact that they are about the same formula. We have got Lilly beat in price, only 85 cents a thousand; we have got Sharp & Dohme beat on the same item, the Lapactic pill, to which our pill is similar in the fact that it is the same formula, and theirs is $1.10 a thousand." He says, "Well, we can't use them." I said, "Well, that will close it." We mentioned Glycerol Thymol Compound in the same way as I mentioned the other items, as being one of the

best solutions on the market. Then we went into patents and I said to him, "I suppose you have plenty of Sloan's Liniment," and he said he had. He said, "We get those from the other store, we buy jointly." Then we talked about old times that we had at school together. I wished him good luck and spoke of different things, not concerning business, and I said "Good-by," and left.

Q. 30. James testified on behalf of the plaintiff and said that you asked him if he sold Lilly's Coco-Quinine, "I told him we did, he said, 'well, I have it.'" State whether that is true?

665 A. It is not. I did not ask him if he sold Lilly's Coco-Quinine. They all sell Lilly's Coco-Quinine as well as other chocolate quinines made by other manufacturers as well as Quin-Coco, but I knew he never did sell Quin-Coco. I did not tell him I had Lilly's Coco-Quinine. That never came up. The only talk we had about Quin-Coco was when I gave him the bottle, as stated heretofore, and told him we had a fine preparation and he read the label, showing two grains of quinine sulphate to the teaspoonful in a perfect chocolate medium and had a fine price; that it was a similar item to all other chocolate quinines on the market.

Q. 31. James testified on page 1152, that you said "You can't tell it from Lilly's." State whether or not you said that.

A. I did not say that you could not tell it from Lilly's. He had the bottle in his hand and was looking at the preparation, and all that was said about it, as I said heretofore, was that it was a similar item as all the other chocolate quinines on the market, Lilly's, Merrill's, in the fact it contained two grains of quinine sulphate to the teaspoonful in a perfect chocolate medium and was a preparation guaranteed not to sour, and absolutely right in price. He said he could not use it and that closed the argument.

Q. 32. James testified as follows (p. 1152): "The next thing he asked me if we sold Lapactic pills. I told him we did." State whether or not that is true?

A. I did not ask him if he sold Lapactic pills. I knew he sold Lapactic pills.

Q. 33. State whether or not you told him that you sold Lapactic pills?

A. I did not tell him I sold Lapactic pills.

Q. 34. In the same answer James testified that you asked him if he sold Hayden's Viburnum Compound, and told him that you sold it. State whether or not that is true?

666 A. I did not tell him that I sold Hayden's Viburnum Compound.

Q. 35. James testified in the same answer that you said that you had the identical thing at a less price than he had to pay for Hayden's Viburnum Compound. State whether or not that is true?

A. I told him I had a similar item. I did not tell him I had an item identical to Hayden's.

Q. 36. James testified in the same answer that you told him that the Hayden's Viburnum people had entered suit against them [meaning Warner] and that Warner had won out in the case and found

his preparation to be identical with others. State whether or not that is true?

A. No, it is not true.

Q. 37. James testified as follows (p. 1154):

"X Q. 13. State all that he said to you about his pills that were just like Lapactic pills, S. & D.?

A. He said we might sell them on orders for Lapactic pills and that we could tell no difference in them."

State whether or not you said that.

A. As I said before all that I said about Lapactic pills was that they—he had a sample in his hand, that they contained aloin, belladonna, strychnine and ipecac; that they were made right, gelatine coating and that they were similar to every other A. B. S. & I. pill on the market and that we had the price—similar to Sharp & Dohme Lapactic and Lilly's A. B. S. & I.

Q. 38. State whether or not you told him he could sell your products on orders for Lapactic pills?

A. I did not.

Q. 39. James testified as follows (p. 1156):

"X Q. 38. Did he tell you that his Quin-Coco was a similar preparation to Lilly's Coco-Quinine?

A. Yes, and that it could be dispensed on orders for Coco-Quinine."

State whether or not you told him that?

667 A. I told him it was similar preparation to Coco-Quinine, but I did not mention anything about dispensing it for Coco-Quinine.

Cross-examination.

By Mr. Bradford:

X Q. 40. Who was Mr. McCorkle's partner, to whom you referred?

A. I don't know his name.

X Q. 41. You spoke of having a price for your Quin-Coco below the price of any other chocolate quinine preparation. Are you familiar with the prices of the other houses?

A. I am familiar with them to a certain extent—that is, not to be exact to the penny, but within ten or fifteen cents. The prices fluctuate.

X Q. 42. What is Lilly's price for Coco-Quinine?

A. I don't know their price today.

X Q. 43. What was it the time you sold McCorkle?

A. I don't remember the exact price at that time.

X Q. 44. What was the difference between his price and yours, or approximately the difference?

A. It would be approximately a dollar a gallon—I don't know his exact price.

X Q. 45. What was Merrill's price?

A. I don't know his exactly. We were approximately a dollar below anybody else on the market—at that time.

X Q. 46. Do you know what the Mulford prices are?

A. No, I do not.

X Q. 47. Do you know whether Mulford's prices were higher or lower than Lilly's?

A. Mulford's prices—I don't know—I don't know exactly. I don't know Mulford's prices at all. Wampole's price, I think, was $5.60, the last I heard of it, about six months before, or about eight months before that—$5.60 or $5.70, something like that.

668 X Q. 48. What Wampole are you referring to?

A. H. K. Wampole.

X Q. 49. Did McCorkle have these other preparations in his store?

A. I don't know. I did not notice his stock, or what he had in the store.

X Q. 50. You did know that he had Lilly's Coco-Quinine?

A. I did not know he had that. I surmised that he did, because all druggists have Lilly's Coco-Quinine in their house.

X Q. 51. I understood you to testify in your direct examination that you did not ask him if he had Coco-Quinine, you knew he carried it?

A. I surmised that he carried it—you notice, I said, because all druggists in the South carry it.

X Q. 52. In your talk with McCorkle you are certain you called his attention to the fact that Quin-Coco was not only similar to Lilly's Coco-Quinine, but to all other chocolate quinine preparations to which you have referred?

A. Yes, sir, I told him that Quin-Coco was a similar item to Coco-Quinine and all the other chocolate quinines, Merrill's Choc-Quin; Wampole's Chocolate Quinine, in the fact that it contained two grains of quinine sulphate to a teaspoonful with a perfect chocolate medium.

X Q. 53. What do you know about Merrill's Choc-Quin?

A. Nothing. I have heard it contains two grains of quinine sulphate to the teaspoonful of chocolate syrup.

X Q. 54. Did you ever examine it?

A. I have looked at it.

X Q. 55. Did you ever handle it?

A. I never dispensed it. I poured it out of a bottle and looked at it in a graduate.

669 X Q. 56. Did you ever compare it with Quin-Coco?

A. No. With Quin-Coco—yes, with Quin-Coco.

X Q. 57. What do you know about some of the other preparations that you have referred to—Wampole's?

A. I have seen Wampole's. It is a chocolate quinine containing two grains of quinine sulphate to the average teaspoonful, but most of what I saw did not stand up in hot weather, and that was one of my chief sales talks. One of my chief ways in getting Quin-Coco into the druggists is the fact that ours does not sour in hot weather, and was an absolutely perfect chocolate quinine.

X Q. 58. How many of these chocolate quinines can you enumerate?

A. To be exact, some of them have gone off the market, and some are still on the market. Merrill makes Choc-Quinine, if I am not misinformed it is still made—I am not sure; Mulford formerly made chocolate quinine and I think they still make it.

X Q. 59. You are in constant touch with the retail drug business?

A. Yes.

X Q. 60. Do you meet these preparations very often?

A. I do not go around in the prescription room to see what a man has. I sell a man right off the bat. I take my demonstration book and go through it, and when we come to a certain item and he says, "I am out of that." I say, "I would be mighty glad to sell you."

X Q. 61. You did know that druggists handled Lilly's Coco-Quinine, and you knew they handled Hayden's Viburnum Compound, and Sharp & Dohme make of pills, you seem to have had that in your mind, with reference to those items. How did you know they handled those items?

A. Because they are used extensively in the South. I know that. I know that if a druggist is in the drug business, he handles the things that are used.

670 X Q. 62. Is the kind of talk that you put up to McCorkle the same kind of talk that you put up to all druggists in seeking to sell them Quin-Coco?

A. As a rule, it is.

X Q. 63. You tell all of them that it is similar in value to Lilly's Coco-Quinine and to all of those other specific preparations?

A. It is similar in the fact that it contains two grains of quinine sulphate to the teaspoonful of syrup.

X Q. 64. Did you ever compare Quin-Coco with Lilly's Coco-Quinine in talking with the druggists?

A. No, sir, I never compared them. I have had a druggist ask me, "Is that Coco-Quinine?" I said, "No, sir, it is Quin-Coco. It is similar to Coco-Quinine, but it is not Coco-Quinine."

X Q. 65. And you never said to any druggist anywhere, at any time, that he could sell Quin-Coco on calls for Coco-Quinine?

A. No, sir.

X Q. 66. And you never told any druggist that Quin-Coco was the same thing in appearance and pharmaceutically and nobody could tell the difference?

A. No, I did not say that Quin-Coco was the same thing pharmaceutically. I said it was similar in appearance, similar in formula and similar pharmaceutically in the fact that the medicinal ingredients of both preparations was quinine sulphate and the proportions in both preparations were the same in the medicinal ingredients, and that it was the same item, and that, as well as all other chocolate quinines on the market are all used for the same purpose.

X Q. 67. You never referred to Lilly's Coco-Quinine without including all the other chocolate quinine preparations on the market?

A. Never without the rest. Sometimes I referred to the others before I referred to Coco-Quinine, and lots of times I never referred to Coco-Quinine at all. Lots of buyers in Georgia use Merrill's, physicians and druggists.

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X Q. 68. Have you ever said to any physician that Quin-Coco was the same thing as Coco-Quinine?

A. No, sir.

X Q. 69. Did you ever say to any physician or druggist or other customer that he could dispense Quin-Coco on calls or prescription for Coco-Quinine, and no one could tell the difference?

A. No, sir.

X Q. 70. Did you ever compare Quin-Coco with Coco-Quinine in seeking to make a sale to any customer?

A. No, sir.

By Mr. Rawle:

X Q. 71. You mean physically?

Mr. Bradford: Yes.

A. No, I never did.

By Mr. Bradford:

X Q. 72. You never took a bottle of Quin-Coco and poured some of it out and then took a bottle of Coco-Quinine and poured some of it out to demonstrate to a customer or a prospective customer that the two items were identical in appearance?

A. No, sir.

X Q. 73. Why did James say that he could not use the article?

A. I did not ask him why he could not use the item.

X Q. 74. Why did he say he could not use the Lapactic pills at such a low price?

A. He said he did not handle anything of the A. B. S. & I. formula—that ended the argument, didn't handle anything in that formula but Lapactics.

X Q. 75. What makes of this chocolate quinine preparation sour?

A. Well, I have seen Merrill's sour; I have seen Wam-

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pole's sour, but I have never known a bottle of Quin-Coco to sour. I have not had a chance to know it very long, but I never had a customer kick about it being sour.

X Q. 76. What makes don't stand up?

A. Well, I have seen Wampole's go bad, and I have seen some of Merrill's go bad.

X Q. 77. You seem to confine your answers chiefly to these two makes, and I infer from that that you are not very familiar with other makes. Is that true?

A. I am not very familiar with Coco-Quinine, only in the fact that it contains two grains of quinine sulphate. Its label says so, and I know its appearance when I see it. I very seldom mention Coco-Quinine to the druggist in saying that Quin-Coco is a similar item to Merrill's Choc-Quinine and the rest of them.

X Q. 78. Why do you say it is similar to Merrill's Choc-Quin?

A. It is similar.

X Q. 79. Is there any demand for Merrill's Choc-Quin?

A. There is.

X Q. 80. Where, and in what trade?

A. Among physicians and druggists both; in my territory there is some of it sold, because I have seen the time when I asked how his stock of Quin-Coco was and a man has said, "Well, I have replaced that with Choc-Quin, Merrill's, you are a little late. My physician don't care which he uses." That is the reason I know there is some there.

X Q. 81. Have you ever in seeking an order from a prospective customer for any one of the items referred to in your testimony, suggested to him that he might use it to substitute for one of the well known and advertised items?

A. I do not suggest substitution.

X Q. 82. And that is not a feature of your sales talks to your customers?

673 A. No, I do not suggest substitution in any item, because we have thousands of items that are initiative with us, our own items.

X Q. 83. You follow the instructions of the house in your sales talk, do you not?

A. Yes.

X Q. 84. And you received those instructions from whom?

A. I get the instructions from the little "Salesman's Confidential," which says that in no case offer any item to be used in place of another item or as a substitute of an item; never mention your competitor only in a nice way, if at all; try not to mention your competitor at all.

X Q. 85. That is a little printed book?

A. Yes, printed instructions to each salesman.

X Q. 86. In the back of the price list?

A. In the back of the "Salesman's Confidential" price list.

X Q. 87. Repeat again what is said on the subject just referred to?

A. Well, it says in part, as best I can remember—the gist of it is this: Not to mention your competitor if you can help it, in any way, and only use his name in good terms and speak well of him and never offer a preparation as a substitute to be used in place of any other preparation when that preparation is called for.

X Q. 88. When did you read this in the book?

A. About a year ago.

X Q. 89. From whom did you receive your instructions?

A. William R. Warner & Company—well, Mr. Pfeiffer or Mr. Hagaman.

X Q. 90. What I want to know is what member of the firm or what representative of the firm travelled with you and gave you instructions?

674 A. Nobody travelled with me. They gave me my grips.

X Q. 91. From whom did you receive your grips?

A. William R. Warner & Company, by express.

X Q. 92. You have had a representative of the house with you in Georgia?

A. Yes, Mr. Hagaman with me, the sales manager.

X Q. 93. Mr. Hagaman travelled with you. Why did you say a minute ago that you never had a representative of the house with you?

A. You asked me if I had a representative of the house with me when I first started out—if that is it, I have had a representative of the house with me. I had the sales manager with me twice or three times.

X Q. 94. Mr. Hagaman?

A. Yes.

X Q. 95. And in your sales methods and sales talks you followed his teachings?

A. He did not teach me. I did the selling and he watched me.

X Q. 96. Didn't he give you any instructions?

A. I was fortunate enough for him not to have to give me any instructions.

X Q. 97. Mr. Hagaman gave you no instructions at all?

A. Only in collecting accounts?

X Q. 98. He left you to your own resources as to selling the goods?

A. No, they gave me instructions in the "Salesman's Confidential."

X Q. 99. And you found the instructions there like you have just stated?

A. Yes, that was part of them—in part. Not all the instructions. I could not repeat them all, because there are three or four pages of them.

X Q. 100. You said that Mr. James did part of the buying, and later that he did all of the buying of your line. What did you mean by that?

675 A. That is, I meant that the patent buying is done at another store; two stores buying jointly. Certain items bought at the other store and then divided.

X Q. 101. Then Mr. James did all the buying at the particular store you referred to?

A. Yes, sir.

Examination closed.

12.30 p. m.

Mr. Rawle requests that the presence of Mr. F. R. Eldred, Chemist for Eli Lilly & Company, be noted.

GEORGE M. BERINGER, being recalled by request of counsel for plaintiff, counsel for defendant consenting, for further cross-examination on testimony heretofore given in this case on June 8th, 1917, in answer to cross-questions testifies as follows:

Further cross-examination.

By Mr. Bradford:

X Q. 134. In testifying in respect to the Bibbins experiments, and referring to the suspending material selected by him, you stated, in answer to X Q. 10 that the materials selected for these ten experiments were such as were commonly selected for their mechanical power of suspending, etc. Will you kindly explain what you intend to be understood by the phrase "mechanical power of suspending"?

A. What I mean by the phrase "mechanical power of suspension"—in suspension we have a distribution of a material throughout a mixture evenly. The material that does the suspending or holding up of the distributed material, we call the suspending agent or suspending material. The process of suspension in connection with which I used the word "mechanical" is practically a physical
676 division or distribution of the substance. In that sense of the word, I use the word "mechanical" meaning it was a physical sub-division or distribution of the article.

X Q. 135. How does chocolate suspend quinine?

A. By virtue of the constituents of chocolate, it has the property of making a mixture that will hold up distributed throughout it in suspension the quinine sulphate.

X Q. 136. Is this, then, your definition of the phrase "mechanical power of suspension"?

A. It would come within the definition of the word "suspension". Suspension is not a chemical process in this class of preparations; it is really a physical one.

X Q. 137. Then, chocolate suspends quinine in a mechanical way?

A. What you might call a physical or mechanical way. It is not a chemical change of quinine, no change of its condition chemically, but it is distributed through the medium by the upholding or suspending power of the chocolate. I think I should explain that the usual use of the word "Chocolate" means cocoa. It is used in the same sense that we have used "Chocolate" throughout these depositions.

X Q. 138. In answer to Q. 11 you stated, respecting these Bibbins experiments, that they are not of the same viscosity. How did you determine the viscosity of the respective specimens?

A. Viscosity was determined by the way in which it flowed and

poured from the bottles. The statement here was a comparative one.

X Q. 139. Do you mean, merely by observation?

A. Observation, yes, sir. There was no determination of the viscosity by a viscosimeter.

X Q. 140. In answer to Q. 17 you say that "The suspending material must produce a uniform, homogeneous liquid." Please define *by* what you mean — "Homogeneous liquid".

677 A. By "Homogeneous liquid", I mean uniform, of the same consistency throughout, and the same composition throughout the fluid.

X Q. 141. Does chocolate form a homogeneous liquid?

A. Chocolate forms a homogeneous suspension in these syrups.

X Q. 142. Is quinine sulphate suspended mechanically in Coco-Quinine?

A. Quinine sulphate is in suspension in Coco-Quinine. Quinine is not in solution, but is in a state of physical or mechanical distribution throughout the syrup.

X Q. 143. Do you use the terms "Suspension" and "Distribution" with different significations? If so, will you distinguish?

A. No, I am using that in a way in which to bring out a definition of the word "Suspension" as we are using it here in its pharmaceutical meaning. In its pharmaceutical meaning it is really distribution, or holding up in the distributive condition, the suspended material.

X Q. 144. In answer to Q. 21 you stated that the acid test showed each of these ten specimens was acid, in varying proportions. How did you determine the degree of acidity?

A. That was simply a comparative term, expressing the action on the litmus paper and the degree of the reaction on the litmus paper.

X Q. 145. In answer to Q. 23 you stated that there appeared to be separated portions of tragacanth mucilage and quince seed mucilage throughout the field. How did you identify the tragacanth and quince seed?

A. By their appearance under the microscope.

X Q. 146. You spoke of the tragacanth "continuing to swell and swell and make an uneven mucilage." How long does it continue to swell?

A. Tragacanth swells practically indefinitely. Insofar as 678 the pharmaceutical use is concerned, it is practically indefinite in its swelling.

X Q. 147. What acid is formed when tragacanth and quince seed decompose?

A. The acid is most likely acetic acid, but that was not determined.

X Q. 148. Does cane sugar solution ferment and become acid?

A. If there is an insufficiency of sugar present, it will do so.

X Q. 149. Will the cane sugar solution, of the concentration present in Coco-Quinine, ferment?

A. I have never observed it, if it fermented.

X Q. 150. Do all acids act upon the quinine as you have testified those present in the Bibbins sample acted?

A. All that I am acquainted with, as possibly present, or have tested, acted in the way that I have testified.

X Q. 151. In answer to Q. 26, referring to the sealed specimen No. 1, you stated that in this specimen you found further separation and unevenness of the preparation since your previous examination in January, and stated that this indicated some additional decomposition or changes. Why does the further separation indicate further decomposition?

A. If you have got some decomposition—in other words, if the preparation had remained as a thorough pharmaceutical preparation there would have been no increase in the precipitation and no increase in the amount of material deposited.

X Q. 152. Please define "Decomposition"?

A. The word "Decomposition", as used here, I think the best way to consider it, is as the equivalent of "Deterioration". Decomposition, as used chemically, might mean that several changes had taken place. Decomposition of quinine, for example; decomposition
of the suspended material or syrup, due to changes of a
679 chemical nature or of a fungus growth, or something of that kind.

X Q. 153. Could not separation be brought about by simply standing?

A. No, not in a perfect preparation; that is evidence of the imperfect suspension.

X Q. 154. In answer to Q. 27, respecting specimen No. 2, you refer to the separation of the tolu in the resinous masses on the sides of the bottle. How did you identify the tolu in this case?

A. No, the tolu was not identified, excepting by the physical character of the sediment. Under the microscope it gave evidence of being resinous. The tolu was the only resinous substance indicated on the label that could have produced this sediment shown by the microscope, and I concluded that this was due to the tolu. Again, it complied with similar precipitates of tolu that I had on other occasions under the microscope.

X Q. 155. Can you distinguish, under the microscope, tolu, tragacanth and Irish moss, without the formulas on the labels?

A. Accepting the statements on the label as true, my conclusion as to what the sediment shown under the microscope was, was guided according to these statements. In each case they have been confirmed by solutions and mixtures of various known substances, examined microscopically.

X Q. 156. What was the size of the gelatinous mass of mucilage referred to in your answer to Q. 27? I am referring particularly to the phrase near the end of the answer, "Separated gelatinous mass."

A. They were of varying sizes. Some were quite perceptible to the naked eye, and others required the microscope to bring them out clearly.

X Q. 157. You have also referred to the gelatin in larger globules?

A. Yes, sir.

X Q. 158. What was the size of the globules?

680 A. They varied, likewise, in size. Some were quite apparent in the mixture themselves. By simply allowing the mixture to flow over the glass, you could see the separated gelatin

portions. It required no examination under the microscope to distinguish the yellow separation of the gelatin.

X Q. 159. You have stated that this specimen was decidedly bitter. Was it more bitter than the Coco-Quinine?

A. Very decidedly.

X Q. 160. In answer to Q. 33 you stated that Acacia, when mixed with water, forms mucilage that is acid. What acid?

A. Acacia contains the normal acid constituents of its own peculiar composition, which are always present, so that it forms immediately an acid solution.

X Q. 161. Does Acacia form a true solution in water?

A. Acacia forms a rather peculiar solution in water. When sufficiently diluted, it will form a solution that rarely can be filtered; but the normal solutions of the gums are peculiar in the solutions that they form. They either stop or clot the filter, or make imperfectly clear solutions. Yet I look upon gum Acacia as forming a true solution, in the ordinary pharmaceutical sense.

X Q. 162. The term "Colloidal" has been used in the previous testimony. Please define the meaning of that term?

A. The word "Colloidal" is used to designate substances which are without definite crystalline form.

X Q. 163. What is a colloidal solution?

A. The words "Colloidal solution," are used to indicate the solution in water of colloidal substances, like the metals, silver or gold.

X Q. 164. Is an Acacia solution a colloidal solution?

A. Not in the same sense.

X Q. 165. In answer to Q. 31 you stated that Acacia is very prone to undergo fermentation, and in this fermentation, an in-
681 creased amount of acid is produced. Is this increase of acid the same acid as referred to in Q. 33?

A. In my opinion, not. That is an acid produced by decomposition.

X Q. 166. What is the acid?

A. Most likely, acetic acid.

X Q. 167. What are the characteristics of dextrine? I have particular reference to your use of the term in your answer to Q. 40, where you say, speaking of the Bibbins Specimen No. 4, "Having flavor and characteristics of dextrine."

A. Do you mean the physical characteristics?

X Q. 168. I mean the characteristics you had in mind when you testified?

A. I said "Having the flavor and characteristics of dextrine." Dextrine has a peculiar, semi-musty flavor, like the ordinary commercial mucilage itself, because that is what much of the commercial mucilage is made of; a musty, peculiar, starchy flavor; and then, under the microscope, this sample showed a partly altered starch grain, which confirmed the presence of dextrine. That is the reason I used that remark there of "The characteristics of dextrine."

X Q. 169. In answer to Q. 41 you stated that coffee contains caffeotannic acid. Is that form of tannic acid a tannin?

A. It has some of the properties of tannic acid. But the words "Tannic acid" we usually use to refer to gallo-tannic acid.

X Q. 170. In the same answer you stated, "I have no doubt that part of that sediment is due to the form of the quinine precipitated out in the form of tannate." How did you determine that it had precipitated out in the form of tannin?

A. I am expressing an opinion there, and not a determination. That opinion is based upon the fact that caffeo-tannic acid was present, and the established fact that quinine is precipitated in
682 the presence of tannic acid.

X Q. 171. Is Quinine Tannate soluble in acids?

A. Quinine Tannate is not very soluble excepting in the strong acids.

X Q. 172. In answer to Q. 43 you said in reference to Bibbins Specimen No. 4, that you considered it "Unstable," &c. Why did you consider this specimen unstable?

A. Because of the sedimentation and lack of palatability, and the changes which the preparation had undergone, I considered it unstable and unmarketable.

X Q. 172*a*. What changes would take place in that preparation?

A. The change there indicated a bitter taste, with the presence of acid and a precipitation of sulphate quinine.

X Q. 173. Referring to "Beringer's Sketches of microscopic appearance," how were these sketches made?

A. They were pen and ink sketches made—a free-hand sketch, while looking through the microscope. That is, when the sketches were made.

X Q. 174. Can you distinguish the mucilage of quince seed, from the mucilage of Irish moss, under the microscope?

A. Yes, sir.

X Q. 175. In what way?

A. Irish moss is larger and more gelatinous and gluey in character.

X Q. 176. In answer to Q. 47 you stated that "Part of the quinine is separated out, as well as part of the mucilaginous material." How did you determine this?

A. The portions of the sediment from the sides of the bottle, where the sediments were shown, were taken out and examined under the microscope, to determine the character of the sedimentation.

X Q. 177. In answer to Q. 53 you stated, in respect to specimen No. 5, that it was less viscous, and would not hold the quinine
683 in suspension satisfactorily." Is this sample less viscous than the Coco-Quinine or the Quin-Coco?

A. Yes, sir.

X Q. 178. Did you determine its viscosity in the same manner as stated before?

A. The viscosity was not determined, excepting by comparative or physical appearance; simply by a matter of judgment, by comparison.

X Q. 179. Is there not some way to express the degree of viscosity numerically?

A. Yes, there is an instrument and method of doing that, which might have been used if I had thought of it as needed in this matter.

X Q. 180. What do you mean by "Thorough miscibility" as used in the answer to Q. 55?

A. The words "Thorough miscibility," as used there, were to explain the homogeneity. What I meant to say was the definite distribution or a homogeneous mixture.

X Q. 181. Is chocolate such a substance?

A. Chocolate itself, do you mean?

X Q. 182. Yes.

A. Chocolate is either a paste, or in a powdered form.

X Q. 183. Is chocolate thoroughly miscible?

A. It can be thoroughly mixed under proper conditions.

X Q. 184. In answer to Q. 56 you say that the medicinal ingredients should be equally and thoroughly distributed. Do you mean by this to state that the quinine in the sample under discussion is not thoroughly and equally distributed?

A. My answer to question 46 is a general answer, referring to all the specimens, and not to any single one.

X Q. 185. Then, I understand, that you did not find the quinine thoroughly and equally distributed in any of the ten samples?

684 A. The quinine was not evenly and thoroughly distributed in any of these samples?

X Q. 186. How did you determine this?

A. By an examination under the microscope, to see the unevenness in the quinine crystals, in the different fields.

X Q. 187. How did you determine the unevenness in the different fields?

A. Under the same magnification we would have, naturally, the same number of quinine crystals.

X Q. 188. Did you count the quinine crystals in the respective fields?

A. I did in a number of them.

X Q. 189. Which ones?

A. Every one of the examples that I examined, I made a number of mounts, and examined the different fields.

X Q. 190. Can you give the figures?

—. As I did not preserve the figures, I did not expect the question would be asked, and did not preserve them.

X Q. 191. Is quinine equally and thoroughly distributed in Coco-Quinine?

A. In the number of examinations that I have made of the Coco-Quinine, there appears to be a uniform distribution of the crystals of quinine sulphate.

X Q. 192. In answer to Q. 59, referring to specimen No. 6, you stated that this specimen was of uneven thickness, which showed separation of the gelatinous-like masses. What were these gelatinous-like masses?

A. They appear to be Irish moss jelly.

X Q. 193. In answer to Q. 66, referring to the Bibbin sample No. 7, you stated that the principal objection was the great acidity and bitterness. Was this sample more bitter than the others?

A. Yes, sir, that sample was decidedly more bitter than some of the others.

X Q. 194. Was it more acid than the others?

685 A. It was.

X Q. 195. In answer to Q. 70, referring to sample No. 8, you stated that starch is not a good suspending material, and that it is very prone to decomposition by hydrolysis. How do you distinguish between decomposition, hydrolysis and fermentation?

A. Fermentation would be one of the methods of decomposition. The production of a fungus growth would be another decomposition that might take place in starch. In other words, "hydrolysis," as used there, refers to the change which starch undergoes very rapidly in pasty forms to certain changes by which dextrose is formed.

X Q. 196. Which takes place first?

A. That would depend on the conditions which existed. I could not tell. It would depend on the temperature, and other conditions which would take place first.

X Q. 197. In answer to Q. 72 you used the word "Glueyness." Please explain the meaning you intended by that word, used in this connection?

A. The glue-like characteristic, both as to the taste, as to the consistency, and stick*y*ness, and the consistency of the mixture. The odor, the taste, and the stick*y*ness, all the glue-like characteristics.

X Q. 198. In answer to Q. 74, referring to specimen No. 10 you stated that "Under the microscope it showed broken-down quince seed mucilage." What do you mean by the term "Broken down," as used in that connection?

A. Separated—lack of evenness of separation.

X Q. 199. Is this the same condition in which you saw the quince seed in the other specimens?

A. In the same separation.

X Q. 200. In answer to Q. 83, referring to Quin-Coco and Coco-Quinine, you stated that "They are neutral, that is, free from acidity." How did you determine them to be neutral?

686 A. The same test that was applied to those two separations that I applied to these ten samples, to determine their acidity or the absence of acidity.

X Q. 201. After a bottle of Quin-Coco, and a bottle of Coco-Quinine have been standing for a long time, is there any difference in the quinine content at the top, and at the bottom?

A. I have not made such a determination.

X Q. 202. Does chocolate contain tannic acid?

A. There may be present in cocoas a minute quantity of an astringent-like principle, similar to a tannin, but the quantity is very small.

X Q. 203. Is that a tannin?

A. It is so classified.

X Q. 204. Do not the so-called natural colors tend to precipitate more than the coal tar colors?

A. That would depend entirely on the accompanying materials with which they were associated.

X Q. 205. Are not some of the natural colors identical with the coal tar colors?

A. Snythetic colors have been produced, wh-ch are stated to be identical, and are so considered, with the natural colors; as, for example, synthetic indigo, and alizarine, used as dyeing materials.

X Q. 206. Have not certain coal tar colors been shown to be harmless?

A. There are certain coal tar colors that are considered harmless, and they are admitted by the decisions of the Agricultural Department to be used as permitted colors in foods.

X Q. 207. Is the napthol yellow, "referred to by Allen," quoted in your deposition, the same as referred to by Bibbins?

A. I do not understand it as such.

X Q. 208. What is the difference?

A. That is not quite clear in my mind at the present time. I did not look into Mr. Bibbins' statement carefully enough to express an opinion as to the chemical difference.

687 X Q. 209. What are the conditions under which tragacanth can be used in solution as a suspending agent?

A. Tragacanth has been used as a suspending agent for oils, like cod liver oil emulsions.

X Q. 210. What are the conditions under which tragacanth can be used in solution as a suspending agent?

A. I do not consider it advisable as a suspending agent where a perfect homogeneous preparation of an insoluble or only slightly soluble substance is to be demonstrated, because of its own lack of forming a homogeneous mixture or solution.

X Q. 211. What are the conditions under which tragacanth will make a clear solution?

A. Tragacanth will make a clear solution in the presence of certain alkaline or chemical salts, such as borax, which would not be admissible to be used in such medicinal preparations.

X Q. 212. Does chocolate contain starch?

A. Chocolate does contain some starch, a peculiar starch of its own.

X Q. 213. How does this starch differ from other starches?

A. Naturally, every starch-bearing product has a starch that is peculiar to itself, and varies from other starches, just as corn starch varies from wheat starch, you might say, as an example. They vary in shape, in size, in texture, and in the character of their coatings.

X Q. 214. Do the different starches have the same chemical composition?

A. That is, to my mind, a mooted question. It is commonly considered that they are chemically of the same composition.

X Q. 215. In answer to Q. 95 you stated that it was objectionable

to use two or more articles, where one will answer the same purpose. Does not chocolate itself consist of several substances?

A. Yes, sir, but the word "Substance" is used there in a different way from what I used it. Chocolate does contain several
688 ingredients, which are natural constituents of chocolate. I used the words "Different substances," to relate to different articles entirely, and not to the constituents of the same one article.

X Q. 216. You also mentioned that there are well known mixtures and oils that become rancid much more quickly than the pure oils themselves. What mixtures do you refer to?

A. Adulterated olive oil, and almond oil become rancid very quickly.

X Q. 217. Adulterated with what?

A. With lard oil, and cotton-seed oil, or other common adulterants.

X Q. 218. In answer to Q. 101, speaking of the microscope which you used, you stated that the magnification was about 500 times. Do you mean 500 diameters?

A. I meant that the sketches shown here were magnified about 500 diameters. The magnification was about 500 diameters in the sketches that I made.

X Q. 219. What power of objective, and eye-piece, were used to obtain this magnification?

A. I was using an $\frac{1}{8}$-inch objective, and most of the time a one-inch eye-piece.

X Q. 220. Were the same used in all of the experiments?

A. The same microscope, and the appliances, were used in all the examinations.

X Q. 221. How long a period of time did you devote to these examinations?

A. Off and on, I spent, possibly, a month on this work.

X Q. 222. How many hours of time would you say were actually devoted to the examination?

A. I made no calculation of the hours. I have worked sometimes from 8 o'clock in the evening until 1 o'clock in the morning.

X Q. 223. Is there tannin in chocolate?

689 A. In chocolate there is an astringent principle, which is classified with the tannins. In my opinion, the trace of the tannin-like principle, present in the commercial cocoas or chocolates, is due largely to the admixture of portions of the shells which may be accidentally or otherwise present. In that hull you have a tannic acid principle. It is like a peanut. You take a peanut in the skin coating there will be tannin, and in the outer shell coating there is some more.

X Q. 224. You speak about certain acids that might be expected to be present in these Bibbins' samples. Can you state what acids you refer to?

A. The acids which would result from a decomposition of the various suspended materials, which were mostly mucilages of acacia, quince seed, tragacanth, etc. The acid which most commonly re-

sults from these decompositions in acetic acid, but at times other organic acids do result from such decompositions.

Redirect examination.

By Mr. Rawle:

R. D. Q. 225. Please explain by what appearance in the litmus paper, used as a test for acidity, the degree of acidity is more or less quickly and fully shown?

A. By the extent of the change in the color from blue to red, and the promptness with which this change takes place.

R. D. Q. 226. What is the natural color of litmus paper, and what effect on its color has an acid?

A. The normal litmus paper is blue, and acid changes this color to a red, the shade of red being increased with the strength of the acid.

The witness, having read his deposition, desires to correct the answer X Q. 172, so as to read thus: "The changes are all indicated by a bitter taste, the presence of acid, and a precipitation."

Examination closed.

690 Mr. Rawle: Counsel for defendant asks Counsel for plaintiff if he will consent to a stipulation respecting the testimony of James W. Wilkins, one of defendant's witnesses, as follows:

On acount of the expense of bringing James W. Wilkins from New Orleans to Philadelphia to be re-examined as a witness for defendant in surrebuttal under the order of the Court, Counsel for both parties stipulate that James W. Wilkins, if recalled as a witness, would deny that he ever said to Elzie H. White, a witness for plaintiff, or in his presence, that he, Wilkins, could sell Quin-Coco to John F. Whiteley to be used as Coco-Quinine, and that he was selling Quin-Coco only to the trade in general for the Coco-Quinine preparation, and that he the said Whiteley or the said White could use Quin-Coco for Coco-Quinine, and that he explained to said Whiteley and in the presence of said White that Quin-Coco was being used and sold to the trade as Coco-Quinine and was being used as such; and that Quin-Coco was being sold and successfully used as Coco-Quinine ; and that he assured Whiteley in the presence of Elzie H. White that he, Whiteley, could sell Quin-Coco as Coco-Quinine; and that he ever assured Elzie H. White that Quin-Coco was the same preparation and sold and used as Coco-Quinine; and that he would deny that he ever said to the said White or in his presence anything to the above effect or any part thereof.

Also that the said James W. Wilkins, if recalled as a witness, would deny that he ever said to William G. Walker, a drug clerk in the employ of the Dodson Drug Store in Dodson, Louisiana, or in his presence, that Quin-Coco could be dispensed on a doctor's prescription when Coco-Quinine was specified and was being dispensed all over the country in this way as Coco-Quinine and would,

if so recalled, deny that he ever said to the said Walker anything to the above effect, or any part thereof, and would testify, if recalled, that the sworn statements in the testimony of the
691 said White and the said Walker above referred to were entirely untrue.

It is further stipulated that this stipulation may be used at final hearing as part of the proofs in the case.

Mr. Bradford: Counsel for plaintiff on having the above proposed stipulation submitted to him for approval, consents that counsel for defendant may make the same a part of the record, as expressing what he (counsel for defendant) has reason to believe said James W. Wilkins would testify to if called as a witness for defendant; he further states that he has no reason to believe, judging by the testimony given by defendant's other employees and by the testimony given by said Wilkins when previously called as a witness for defendant, that he (said Wilkins) would not deny the facts testified to by Elzie H. White and Wm. G. Walker, witnesses for plaintiff; and to this extent and for these reasons he (counsel for plaintiff) agrees that the proposed stipulation may be made of record but does not agree that any of the statements therein are statements of fact, or true; or that they in any respect are sufficient to overcome the testimony of said White and Walker.

Mr. Rawle: Plaintiff's counsel is requested to stipulate, but only for the purposes of this case, the following to be facts:

1. That the average number of traveling drug salesmen employed by defendant during each of the specified years from July, 1908, to Dec. 31, 1916, was as follows:

	St. Louis office.	Philadelphia office.
1908, from July	21	21
1909	33	30
1910	37	33
1911	44	37
1912	47	39
1913	43	36
1914	46	31
1915	40	32
1916	46	33

692 2. That the total number of individual traveling drug salesmen (including the above average sales force (employed by defendant in each year from July, 1908, to December 31, 1916, was as follows:

	St. Louis office.	Philadelphia office.
1908, from July	21	21
1909	37	48
1910	55	61
1911	48	50
1912	65	59
1913	70	57
1914	55	45
1915	56	38
1916	54	43

3. That the total number of all individuals employed by defendant as traveling drug salesmen during said period was:

St. Louis office	150
Philadelphia office	163

of whom 104 were discontinued, at various times in the period specified, at the St. Louis office, leaving 46 salesmen on December 31, 1916; and 130 were discontinued at various times at the Philadelphia office, leaving 33 salesmen on December 31, 1916.

4. That Demonstration Books containing copies of defendant's labels, and such as are referred to by several of defendant's witnesses, were a usual part of the selling equipment of defendant's salesmen. Copies are offered in evidence marked Defendant's Demonstration Book No. 1 and No. 2.

5. That Charles A. Noiret who testified in this case on behalf of the plaintiff on July 12, 1915 (P. R. p. 628), left the employ of H. K. Mulford Company on December 14, 1914, and that in September, 1915, he entered the employ of Eli Lilly & Company, the plaintiff, as a Drug Salesman, through its New Orleans Branch
693 & 694 Office and remained in that employment until some time in December, 1915. He was not under the direct supervision of the Home Office at any time.

Mr. Bradford: Counsel for plaintiff is willing to stipulate that the statements recited in paragraphs 1, 2, 3 and 4 would be made by one of defendant's officers or employees if called as a witness and that they may be made of record to have the same force and effect as if so introduced, but subject to the objection that they are immaterial, irrelevant and incompetent as evidence; and the same objection is made to the introduction of the Demonstration Books as exhibits.

As to the statements in paragraph 5 respecting Charles A. Noiret, Counsel for defendant is advised that inquiry at the home office of plaintiff in Indianapolis shows that the statements as to Noiret's employment by plaintiff are correct, and he agrees that they may be taken herein as facts, upon the statement of H. K. Mulford & Co. as to their employment of Noiret, the above statement may be taken

herein as if testified to by a competent witness having knowledge of the facts.

Counsel stipulate that the signatures of witnesses to their typewritten deposition are waived.

Examination closed.

695 *Opinion upon Final Hearing upon Pleadings and Proofs.*

(Filed September 29, 1920.)

THOMPSON, *J.:*

The plaintiff is a corporation engaged, at Indianapolis, Indiana, in the manufacture and sale of pharmaceutical and chemical products. It employs a large staff of traveling sales agents in selling its product to druggists and physicians throughout the United States. In 1899 it commenced the manufacture and sale of a liquid preparation known as Coco-Quinine. It contains quinine as its therapeutic agent, and is designed for the administration of quinine sulphate in cases where the liquid form is preferred to capsules or pills. Yerba-Santa is used in the compound to disguise the bitterness of the quinine, and chocolate syrup is used for a coloring and flavoring medium. The formula is not patented and the preparation is not the subject of a registered trade-mark. It is put up in bottles with a label with the word "Lilly" in red script on a green background. The plaintiff, through its sales agents, was successful in introducing it and establishing extensive sale for it among pharmacists and dispensing physicians, that is, those who do not prescribe for their patients but supply medicine from their own stock. The sales by druggists were upon physicians' presriptions and to customers who inquired for chocolate-quinine or Coco-Quinine.

The defendant is a Pennsylvania corporation organized in 1908 to take over the long-established business of William R. Warner & Company, pharmaceutical and chemical manufacturers, and is chiefly owned and managed by Mr. Henry Pfeiffer, Mr. Gustavus A. Pfeiffer and Mr. G. D. Merner, through holdings of its stock,
and they are also the owners of the Pfeiffer Chemical Com-
696 pany and Searle & Hereth Company. For the purposes of this suit, the united control and the close union in business of these three companies is not disputed.

In 1906 the Pfeiffer Chemical Company put upon the market a product known as "Quin-Coco." This product is practically identical with the plaintiff's Coco-Quinine. It consists of quinine with yerba santa, vannilin, saccharin and coca, with a syrup base.

Since the organization of the defendant company in 1908, Quin-Coco has been manufactured by the Searle & Hereth Company, and distributed solely by the defendant, the Warner Company.

The defendant has since its organization through its sales agents distributed and sold Quin-Coco as a substitute for Coco-Quinine,

It has not attempted to sell it as Coco-Quinine, but has offered it and solicited orders for it from druggists as a substitute for Coco-Quinine and identical to it in therapeutic value. It is not established nor is it claimed that it is known to consumers as a product of the Eli Lilly & Company. The use of chocolate to disguise quinine in tablet and lozenge form and the use of yerba santa in the compound to disguise the bitterness of the quinine was not new when the plaintiff made its preparation in liquid form, nor was the plaintiff the first discoverer of the use of chocolate for disguising quinine in liquid form. First in tablets or lozenges and later in liquid form the combination was known long prior to the manufacture of the plaintiff's preparation. The plaintiff's bill is based upon the ground that it originated the product and distinguished and identified it as its product by the color and flavor of chocolate, which is not essential to its therapeutic value, the chocolate being used for the sole purpose of making the remedy known by color and taste. It claims that chocolate is but one of many in-
697 gredients which could be used for this purpose, but by no means the sole medium. It claims that Coco-Quinine was the first successful preparation commercially known to physicians and druggists; that by legitimate business methods the plaintiff made it a distinctive and desired product throughout the United States and won for it a high reputation with physicians, druggists and the public in general; that into the market created by the plaintiff at great expense and effort, the defendant introduced Quin-Coco by selling in that market a counterfeit of Coco-Quinine under name resembling that used by the plaintiff for its genuine article; that the defendant's product was sold as a substitute for plaintiff's by unfair and dishonest means, supplying the counterfeit where the genuine was desired and called for, with the result that in numerous instances druggists filed prescriptions calling for Coco-Quinine with Quin-Coco and sold Quin-Coco when they knew Coco-Quinine was desired. It is claimed that by these alleged deceptive and dishonest means the defendant acquired trade which had been built up by the efforts and at the expense of the plaintiff.

The plaintiff seeks an injunction restraining the defendant from the further manufacture and sale of a liquid preparation in the administration of quinine or quinine in liquid form colored or flavored with cocoa. It further wants an injunction restraining the defendant from the use of the name Quin-Coco as a name designating such product on the ground that it is a mere reversal of the words comprising the name long used by the plaintiff for designating its product Coco-Quinine.

The effect of issuing an injunction would be to grant the plaintiff a monopoly, perpetual in effect, of the right to manufacture and sell a liquid preparation containing quinine with its bitterness dis-
guised by the use of yerba santa, or some similar agent, if
698 any exists, in combination with cocoa, which is chocolate less its fatty components, and which gives the preparation a distinctive color and flavor. The defendant contends that it can

lawfully make and sell a substitute for any medicinal preparation, provided it does not do anything which would constitute "passing off" its product for that of another. The plaintiff, while conceding that it has no exclusive right to the formula unless patented and conceding further that it has no trade-mark, and that the defendant has not attempted to simulate the label upon its package, contends that because of the circumstance that after its formula for a liquid preparation of quinine and yerba santa was satisfactorily worked out, it adopted the use of chocolate so as to give the preparation a distinctive color and flavor, which would identify it as the plaintiff's product, the public was, through unfair means, deceived through the defendant's imitation containing the same color and flavor.

The plaintiff cites the case of Coco-Cola Co. vs. Gay-Ola Co., 200 Fed. 720, and the authorities on which that decision is based, to sustain its position that the defendant may not use chocolate or cocoa for coloring the product because the plaintiff has used it to give its product a distinctive color and flavor. This contention, if the facts were such as to show acts on the part of the defendant to induce dealers to deceive the consumer into believing that it was getting the plaintiff's product, would have support in the Gay-Ola case if the function of the chocolate were merely to give a disinctive color. The Gay-Ola product was colored by the use of caramel and, as stated by the Court:

"There is here no claim that caramel serves any other purpose in either compound, except merely to give color, and saying that it is one of the 'component elements,' as one of the witnesses does, 699 is saying nothing more. It follows that the adoption, not only of caramel, but of the selected amount of caramel, was for the main and primary purpose of making the two articles look just alike. In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers."

The plaintiff, however, must go further than debarring the defendant from the use of chocolate as coloring matter. It is alleged in the bill and proved in the case, and is a matter of common knowledge, which perhaps requires no proof, that the flavor of chocolate is obtainable from no other substance. The plaintiff must therefore debar the defendant not only from the use of the color, but from the use of the flavor of chocolate. In support of this proposition, the plaintiff has not cited any authorities, and I think the obvious reason is that there are none, to the effect that flavors, and particularly such a distinctive flavor as chocolate, may, because adopted by the plaintiff, be monopolized. While the plaintiff has shown that other liquid preparations of quinine with the bitterness disguised and flavor added may be made, it has not shown that the chocolate flavor may be obtained by any other means than by the use of chocolate, or that chocolate flavor may be used without producing the chocolate color in the liquid. While the distinctive flavor of chocolate is a matter of common knowledge, it is equally a matter of common knowledge

that it is a flavor which appeals to the palate and taste of people almost universally.

The plaintiff is confronted at first with this proposition: That it has no exclusive right to the use of its formula. Its only right is to prevent anyone from obtaining or using it through a breach of trust or contract, and anyone that came honestly to the knowl-
700 edge of it could use it without the plaintiff's permission and against its will.

Chadwick vs. Covell, 151 Mass. 190.

The ingredients of which its product was composed are of such common every-day use that the plaintiff cannot be held to have the right to prevent others from using the same combination as used by it, and the preparation may be used and manufactured by anyone who in good faith acquires knowledge of its composition and such person may publish the fact that he has made it in accordance with the original formula.

Hostetter vs. Fries, 17 Fed. 620.

Upon the right of the plaintiff to appropriate, through its appropriation of the color, the flavor of chocolate, the case of Wrigley & Company vs. Grove Company, 183 Fed. 99, is in point. The Court said in the case:

"The right to make and sell chewing gum out of ingredients not deleterious to health and to flavor it with wintergreen, vanilla, strawberry, pineapple, spearmint or any other flavoring material, is inherent in every citizen, whether a corporation or an individual. Having a right to make and sell gum, it follows, as a necessary corollary, that he has the right to describe it. The flavor is a very important factor, regarding which the public desires to be informed and which the seller has a clear right to communicate, if, indeed, he is not under obligation to do so. If his gum be flavored with spearmint, for instance, he cannot inform the public of this without using the word 'Spearmint,' and to deprive him of that privilege is to interfere with his rights. Spearmint is a descriptive term as applied to chewing gum and no one can deprive a manufacturer of its use or appropriate it as a trade-mark."

701 While that case was upon the question of the right to appropriate the word "Spearmint" as a trade-mark, it being the name of a well-known flavor, the denial of the right is based upon the right of any manufacturer to flavor his product with whatever flavoring material he desires.

To the same effect is Larson, Jr. Co. vs. Lamont, 257 Fed. 270, where the question was the right to the exclusive use of the word "Pep-O-Mint," which was denied upon the ground that it was the mere indication of a flavor, the use of which was open to the public generally.

It follows, therefore, that the right of the defendant to use chocolate flavor carries with it a right to use that color unless it should

appear, which it does not, that the flavor could be used without the color.

The effect of the plaintiff's contention would be that the consumer who asks for chocolate quinine, cocoa and quinine, or quinine flavored with cocoa or chocolate, cannot have his remedy with the desired flavor unless he purchases the plaintiff's Coco-Quinine, because one of the incidents of the flavor is that it carries with it a color in which the plaintiff has a monopoly to indicate the derivation of its product. If, conceding that the chocolate has no therapeutic value, although it is contended by the defendant that it has a peculiar value as a physical mixer for the quinine, there can be no exclusive use of the flavor, it follows that the plaintiff cannot acquire an exclusive use of it because of the incident of color under the claim that that marks the derivation of its product.

We come now to the right of the defendant to use the name Quin-Coco as affected by its similarity to that of the plaintiff's product, Coco-Quinine. It is too well settled to require citation of authorities that a mere descriptive name cannot be monopolized. What
702 the plaintiff has for sale is a mixture of quinine and chocolate or cocoa and the name discloses that fact. It does nothing more. It is not an arbitrary name, disclosing the derivation of the product from the plaintiff, and the defendant, therefore, has the right to use a combination indicating the same facts in relation to its product by use of the name Quin-Coco. The combination of quinine and chocolate was known in the books and catalogues under various names containing the same significance for years before the plaintiff adopted its name, and there is proof in the case of a number of products bearing names indicating the use of the same materials in pharmaceutical preparations for the past ten years.

The plaintiff does not contend and there is no evidence to show any direct "passing off" of the defendant's product for that of the plaintiff. The plaintiff contends that the evidence shows that the defendant's agents in selling Quin-Coco as a substitute for Coco-Quinine used unfair selling methods in suggesting to druggists that because of the similarity of the products in therapeutic value and appearance, it could be passed off by the druggist to the consumer who asked for Coco-Quinine, and could also be substituted by the druggist in prescriptions which called for Coco-Quinine, thus by suggestion inducing the druggist to pass off Quin-Coco for Quinine. And it is contended that there is sufficient evidence to establish the fact that druggists have, through these suggestions of defendant's salesmen, actually passed it off upon the public and physicians. The evidence upon this point has been carefully examined. In a charge of this nature, the testimony could be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses
703 upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the

defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions.

The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested the alleged unfair selling methods on the part of its salesmen. That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales-manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods.

It is held that the defendant had a lawful right to reproduce the plaintiff's preparation; to tell the plaintiff's customers that it was essentially the same as the plaintiff's product in composition and therapeutic effects; and to sell it as a substitute for the plaintiff's product.

Saxlehner vs. Wagner, 216 U. S. 375;
De Long Hook & Eye Co. vs. American Pin Co., 200 Fed. 66;
Viavi Co. vs. Vimedia Co., 245 Fed. 289;
704 Singer Mfg. Co. vs. Loog, L. R. 8 Appeal Cases 15;
Singer Mfg. Co. vs. June Mfg. Co., 163 U. S. 169.

The plaintiff has no exclusive right in the color and flavor inevitably following the use of cocoa or chocolate which the defendant had a right to combine with quinine in a pharmaceutical preparation.

The defendant had a lawful right to call its preparation Quin-Coco, which is a descriptive name of the same effect as Coco-Quinine.

The plaintiff has not established unfair selling methods on the part of the defendant.

It follows that the bill should be dismissed with costs to the defendant, and it is so ordered.

Final Decree.

(Filed October 18, 1920.)

Before Thompson, J.

And now, this eighteenth day of October, 1920, this cause having come on for a hearing on bill as amended and answer as amended and proofs and having been argued by Ernest W. Bradford, Esq., for plaintiff, and Francis Rawle, Esq., and Roger S. Baldwin, Esq., for defendant, thereupon upon consideration thereof,

It is ordered, adjudged and decreed, that the bill be dismissed with costs to the defendant.

By the Court,

Attest:
(Sgd.) GEORGE BRODBECK,
Clerk.

Agreed to as to form:

(Sgd.) E. W. BRADFORD,
Counsel for Plaintiff.

705 *Petition for Appeal.*

(Filed November 13, 1920.)

To the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania:

The Eli Lilly & Company, plaintiff in the above-entitled case, believing itself to be aggrieved by the final decree made and entered in this case on the eighteenth day of October, 1920, dismissing the bill of complaint in this cause, with costs to defendant, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that said appeal may be allowed and a citation issued directed to the William R. Warner & Company, defendant herein, commanding it to appear before said United States Circuit Court of Appeals for the Third Circuit to do and receive what may appertain to justice to be done in the premises; that a transcript of the record, proceedings, evidence, and exhibits in the case, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Third Circuit, and that the said decree of said District Court may be reversed and such decree made as to said United States Circuit Court of Appeals may seem mete and just; and desiring to supersede execution of the decree, petitioner hereby tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

(Sgd.) E. W. BRADFORD,
Solicitor and Counsel for Plaintiff.

706 *Order Allowing Appeal.*

(Filed November 13, 1920.)

Before Thompson, J.

The foregoing petition for appeal is granted and allowed this thirteenth day of November, 1920, and shall operate as a supersedeas

upon the petitioner filing a bond in the sum of $2,750 with sufficient sureties to be conditioned as required by law.

By the Court,

Attest:

(Sgd.) GEORGE BRODBECK,
Clerk.

Plaintiff's Assignment of Errors.

(Filed November 13, 1920.)

Now comes the plaintiff in the above-entitled cause and says that the final decree made and entered therein on the eighteenth day of October, 1920, is believed to be manifest error, and for errors it assigns the following:

The Court erred in holding in its opinion:

1. That in 1906 the Pfeiffer Chemical Company put upon the market a product "known" to the user as Quin-Coco;

2. That defendant has not attempted to sell its product as plaintiff's Coco-Quinine;

3. That defendant offered its product and solicited orders for it merely on representations that it is a substitute for Coco-Quinine and identical with it in therapeutic value;

4. That the evidence does not establish and that it is not claimed that defendant's product is used by consumers believing they are using the product of The Eli Lilly & Company;

5. That chocolate had been used to disguise quinine in tablet or in lozenge form prior to plaintiff's product;

6. That the combination of plaintiff's product in any form was ever known prior to plaintiff's preparation;

7. That the proofs do not show acts on the part of defendant which induced dealers to deceive the consumer into believing that the consumer was getting plaintiff's product when, as a matter of fact, he was being given defendant's product;

8. That the flavor or the color incident to the use of chocolate or cocoa in the preparation is in any way material to the therapeutic value or salability of the preparation;

9. That defendant had any right to use chocolate flavor or chocolate color in its preparation;

10. That plaintiff is not correct in its contention that the consumer who asked for "chocolate quinine," "cocoa and quinine" or "quinine flavored with cocoa or chocolate" is not entitled to have his order filled with plaintiff's product;

11. That plaintiff has not a right to have its product used to supply calls by consumers for "chocolate quinine," "cocoa and quinine" or "quinine flavored with cocoa or chocolate";

12. That plaintiff cannot acquire an exclusive right to the use of chocolate or cocoa as a coloring and flavoring medium in a medicinal preparation;

13. That "Cocoa-Quinine" is essentially a descriptive name and not capable of appropriation as a common-law trade-mark;

14. That "Quin-Coco" is a descriptive term free to defendant's use, and not such a simulation of plaintiff's name "Coco-Quinine"
708 as to be likely to cause confusion in the trade and constitute infringement of plaintiff's rights;

15. That plaintiff does not contend that there is no evidence to show direct passing off of defendant's product for that of plaintiff;

16. That plaintiff has not proved by competent evidence that defendant through its agent actually passed off its product upon the public for plaintiff's product;

17. That the evidence that defendant has through its agents, officials and employees, succeeded in passing off its product for plaintiff's product is not direct, clear and positive;

18. That such testimony in most instances consists of "impressions of the witnesses" as to what defendant's salesmen meant rather than statements of what they said;

19. That the answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through "objectionable leading questions";

20. That the denial by defendant's salesmen and employees of the acts of which they are charged, is of material consequence in this case;

21. That plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested alleged unfair selling methods on the part of its salesmen;

22. That defendant had a right under the law to represent to its customers that its product was identical with plaintiff's product;

23. That no officer or sales manager of defendant authorized or instructed its salesmen in unfair selling methods;

24. That plaintiff has failed to establish its right to a decree based upon unfair selling methods;

709 25. That defendant has a lawful right to reproduce plaintiff's preparation and to sell it as a substitute for plaintiff's product;

26. That plaintiff has no exclusive right in the color or flavor of its product;

27. That defendant had a lawful right to call its preparation "Quin-Coco;"

28. That plaintiff has not established unfair selling methods on the part of defendant;

29. That the bill should be dismissed with costs to defendant;

Wherefore, the plaintiff prays that said decree may be reversed and that the said District Court may be directed to enter a decree in accordance with the prayers of the bill of complaint.

(Sgd.) E. W. BRADFORD,
Solicitor and Counsel for Plaintiff.

710 *Præcipe for Transcript of Record.*

(Filed February 14, 1921.)

The appellant indicated the following portions of the record to be incorporated in the transcript on appeal:
Docket entries;
All pleadings and testimony as printed and included in the record on final hearing before the District Court;
All exhibits used in the trial before the District Court;
The Opinion of the Court;
Final Decree;
Petition for Appeal;
Assignments of Errors;
Citation;
Stipulation respecting record on Appeal;
Order approving Stipulation;
Præcipe;
Order as to Security for Costs on Appeal.

(Sgd.) E. W. BRADFORD,
Counsel for Plaintiff.

711 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the case of Eli Lilly & Company vs. Wm. R. Warner & Company, No. 1355, December Sessions, 1914; as per præcipe filed, a copy of which is hereto attached, the transcript in the above-entitled case is to include, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this eleventh day of March in the year of our Lord one thousand, nine hundred and twenty-one, and in the one hundred and forty-fifth year of the Independence of the United States.

[SEAL.] GEORGE BRODBECK,
Clerk.

712 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633.

THE ELI LILLY & Co., Appellant,

vs.

WM. R. WARNER & Co., Appellee.

And afterwards, to wit, on the eleventh day of May, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. Victor B. Woolley and Hon. J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the thirtieth day of September, 1921, come the parties aforesaid by their counsel aforesaid, and the Court now being dully advised in the premises, renders the following decision:

713 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633.

THE ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, Woolley and Davis, Circuit Judges.

WOOLLEY, *Circuit Judge:*

The issues in this case are unfair competition and infringement of a common law trademark. We shall give just enough of the facts to disclose the controversy and make clear our decision, referring to

the opinion of the trial court reported at 268 Fed. 156 for a statement in detail.

The plaintiff, The Eli Lilly and Company, a corporation of Indiana engaged in the manufacture and sale of pharmaceutical products, put upon the market in 1899 a compound called Coco-Quinine. It is a liquid preparation containing quinine as its therapeutic agent; yerba-santa, used to disguise the bitter taste of quinine; and
714 chocolate syrup, used as a coloring and flavoring medium.

The plaintiff built up a large trade in the product by having its salesmen first call upon prescribing physicians and explain its merits, and then by selling it to druggists, who retailed it to customers on physicians' prescriptions and on their own demand. The formula is not patented.

The defendant, Wm. R. Warner & Company, a Pennsylvania corporation, was organized in 1908 to take over the long established business of William R. Warner & Company, pharmaceutical and chemical manufacturers. The defendant corporation, Pfeiffer Chemical Company and Searle & Hereth Company are under one ownership and control. In 1906 the Pfeiffer Chemical Company put on the market a compound which it called Quin-Coco, being identical in color, taste and composition with the Coco-Quinine of the plaintiff. Later, Quin-Coco was manufactured by the Searle & Hereth Company and distributed by Wm. R. Warner & Company, the defendant. In competing for the trade of retail druggists the defendant did not pass off its Quin-Coco as Coco-Quinine but offered it on the representation that it is the same as Coco-Quinine and could be used as a substitute for it.

By its bill of complaint, the plaintiff avers that its Coco-Quinine was the first liquid preparation of quinine sulphate with the taste of quinine disguised, and the first of many similar preparations (afterward put out) to be colored and flavored with chocolate, and prays an injunction against infringement of its common law trademark and against the defendant's practices of unfair competition, claiming in effect the sole right to use chocolate as the distinguishing agent of its product. The court resolved the issue of unfair competition against the plaintiff on the ground that, as that concern does not manufacture its product under a patent, and as it has no exclusive right to the use of its formula or to any of its ingredients, the preparation may be made by anyone who, in good faith, acquires knowledge of its composition, and may be sold in open com-
715 merce on his representation that it is the same as the plaintiff's preparation. Hostetter vs. Fries, 17 Fed. 620. Thereupon, the court held that the defendant did not engage in unfair competition in using chocolate for the color and flavor of its preparation. It also held that the plaintiff had acquired no common law trademark in the words Coco-Quinine, they being merely descriptive of the contents of the mixture, and that, in consequence, it could not complain when the defendant used practically the same words transposed to describe the same things. On the dismissal of the bill the plaintiff took this appeal, raising here the same questions that were tried below.

We find ourselves in accord with the learned trial judge on the issue of infringement. Although the plaintiff conceived the name Coco-Quinine and gave it a substantial commercial value (as evidenced by the large trade built upon it as well as by its almost literal appropriation by the defendant), the name is, nevertheless, but descriptive of the ingredients in the compound and, therefore, cannot become the subject of trademark. Nor do we find ourselves at variance with the learned trial judge on the law of unfair competition, argued by counsel with great elaboration. We are constrained, however, to differ with him on the application of the law to what we regard as the controlling facts of the case. While these facts are many, they go to a matter that greatly narrows the area of the controversy and calls into operation but one principle of law. They are briefly as follows:

The defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, as it had a right to do. But the trouble is with the manner in which it did it. The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were
716 in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would given to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be "substituted without detection" and "without anyone being the wiser." Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law. This measure turns on two questions:

The first question is one of fact,—whether it is fraud for a druggist

to substitute a drug for the one called for by a physician's prescription or by a customer directly. That substitution of drugs is fraud upon the consumer, who, from the very nature of the transaction, is helpless to protect himself, is so obvious as to require no
717 discussion. For the protection of those who are exposed to the dangers of such fraud, courts will exercise to the utmost all the resources of the law. We have no doubt that the substitution of Quin-Coco for Coco-Quinine extensively practiced by druggists amounted to fraud and of the same opinion were a number of the very druggists who practiced the deception. This then was fraud, but it was the fraud of druggists.

The next question is one of law,—whether in counseling such fraud and in supplying the means with which to effect it (that means being in itself quite innocent) the defendant also was guilty of fraud. Put in this way the question is not whether the defendant can be held responsible for the fraud of third parties, the ultimate sellers (Hostetter vs. Fries, 17 Fed. 620), but it is whether in counseling fraud and in supplying on innocent means with which to bring it about the defendant has itself committed fraud. This question turns not alone on the character of the means. Admittedly the plaintiff has no monopoly in its formula nor has it an exclusive right to the use of any of its ingredients. This leaves the defendant and everyone else free to duplicate the plaintiff's preparation and enter the trade in competition, if, in so doing, they do not infringe the right of consumers not to have passed off on them the product of one maker as the product of another. This right resides in the public without regard to whether the party for whose goods another product is passed off has or has not a monopoly in them or an exclusive right to use certain of their distinguishing ingredients. A customer has a right to get what he calls for and pays for. If the effect of a practice is to deceive an unwary customer and lull him into the belief that he is getting what he asked for when in fact he is getting something else, the practice is illegal because a fraud upon him. And this is so (certainly where, as in this case, the purpose as well as the effect was to deceive the consumer) even when the dress or get-up of the substituted preparation is open to use by everyone.

Thus in the case of Lever vs. Goodwin, 57 Law Times Re-
718 ports, 583, 4 R. P. C. 492, the plaintiffs put their soap into wrappers of imitation parchment paper (which was then not a common thing), and printed (which was unusual) some letterpress on it in spaced or broken type. The defendants put up their soap in wrappers of imitation parchment paper, and they also printed on the wrappers letterpress in spaced or broken type. Their letterpress was quit different from the plaintiffs', and the defendants' name appeared in capitals four times among the letterpress, but the court found that though the printing was wholly different, the effect of the get-up was to mislead the customer, and held the practice unlawful notwithstanding the plaintiffs had no monopoly either in the kind of paper used as a wrapper or in the style of printing appearing upon it. Of a like opinion was the court in Coca Cola Co. vs. Gay-Ola Co.,

200 Fed. (C. C. A. 6th.) 720, where the defendant used the free agent of caramel to simulate the color of the preparation it was imitating. These English and American decisions are authority not only for the law that the innocence of the instrument of fraud does not per se avoid unfair competition but also for the law that in supplying the instrument (with similarities which singly would not be unlawful) the defendant cannot avoid responsibility for the part it took in the fraud committed—or completed—by the other. In the Lever case the retail dealer was not deceived in purchasing the product. Neither was he deceived in the Coca Cola case; nor in this case. The dress of the product in each case as it went to the dealer was entirely distinctive. The evident purpose in each case was to deceive, not the retail dealer, but the ultimate consumer. For the consumer in this case the preparation was rebottled. To him it came, not in the distinctive dress in which it reached the retail dealer, but naked. The only mark it had was that of color, which (as in the Coca Cola case) the defendant labored to make non-distinctive. Having counseled fraud upon the ultimate consumer and having put in the hands of the retail dealer the means of committing the fraud, there is no room for the defendant to shift the blame to the retail dealer
719 and no ground for the defendant to say that it is not answerable for the part which it itself played in the deception of the consumer. Certainly the defendant was an accomplice, if not the principal, in the practice. Lever vs. Goodwin, 57 Law Times Reports (N. S.) 583, 4 R. P. C. 492; Coca Cola Co. vs. Gay-Ola Co., 200 Fed. 720; Garrett vs. Garrett, 78 Fed. (C. C. A. 6th) 472, 476; Royal Co. vs. Royal, 122 Fed. 337, 345; Kalem vs. Harper, 222 U. S. 55, 63, 38 Cyc. 778, notes; Cutler on "Passing Off."

With unfair competition thus established, we think an injunction should issue restraining the defendant, directly or indirectly, from inducing and enabling retail drug dealers to substitute Quin-Coco for Coco-Quinine. But it is said that such an injunction would deprive the defendant of using, as a coloring agent, an ingredient admittedly free to everyone. That is true, but, as we are deciding this case on conduct rather than on chocolate, we think the defendant has forfeitted its right to the use of chocolate as a coloring agent because of its misuse; namely, the double fraud upon the public and a competing producer. That the defendant may no longer derive advantage from its own fraud by resort to an ingredient the use of which otherwise is lawful, we direct the court below to award an injunction restraining it hereafter from using chocolate as a coloring matter in its preparation named Quin-Coco. The only practical way of protecting the public and the plaintiff from a continuance of its unfair practices is to deprive the defendant of the ingredient by which alone it made those practices effective.

It should be noted that by this decision the plaintiff is not given a monopoly in the use of chocolate. Therefore the injunction restraining the use of chocolate in a liquid preparation where the taste of quinine is masked will extend only to the defendant whose practices with reference to it have been unlawful. We are not adjudicating the acts and responsibility of other makers of similar prepara-

tions, for with respect to them w have not been informed of wrong doing.

The decree below is reversed with costs.

720 Endorsements: 2633. Opinion of the Court by Woolley, J. Received & Filed Sept. 30, 1921. Saunders Lewis, Jr., Clerk.

721 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633 (List No. 19).

ELI LILLY & Co., Appellant,

vs.

WILLIAM R. WARNER & Co., Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with the direction that an injunction issue in accordance with the opinion of this court.

Philadelphia, September 30, 1921.

VICTOR B. WOOLLEY,
Circuit Judge.

Endorsements: 2633. Order Reversing Decree, etc. Received & filed Sept. 30, 1921. Saunders Lewis, Jr., Clerk.

722 In the United States Circuit Court of Appeals, for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & Co., Appellant,

v.

WM. R. WARNER & Co., Appellee.

Petition of Appellee for a Reargument.

Joseph W. Henderson,
Roger S. Baldwin,
Francis Rawle,
For Petition.
George W. Wickersham,
Counsel.

722*a* In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & COMPANY, Appellant,

v.

WM. R. WARNER & COMPANY, Appellee.

Petition for a Reargument.

This Court in its opinion while expressing its concurrence with the learned Judge in the District Court upon a number of points, has felt constrained to differ with him on the application of the law to what it says it regards "as the controlling facts of the case." Thereupon it makes a statement of what these facts are. Very respectfully, but most earnestly, we urge upon the Court that these so-called facts are not supported by the evidence in the case, that is to say, we do not urge that they are not established by the weight of evidence, but that to a very large extent there is no evidence whatever of the alleged fact, or that the evidence is entirely insufficient to justify a deduction of the so-called fact stated. We feel confident that this criticism can be shortly demonstrated.

722*b* I. Alleged facts concerning experimentation by defendant.

The opinion says:

"The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded."

The relations of Pfeiffer Chemical Company, Searle & Hereth Company and William R. Warner and Company (the defendant) to Quin-Coco were these:

Pfeiffer Chemical Company (a St. Louis concern) first made and sold Quin-Coco "in the fall of 1906." (3 D. Proofs, p. 9, Q. 5.)

In June, 1906, Pfeiffer Chemical Company became affiliated with Searle & Hereth Company, also a St. Louis concern. (3 D. Proofs, p. 58, Q. 229.)

Quin-Coco, being a pharmaceutical preparation, was then transferred to the Searle & Hereth list, and Pfeiffer Chemical Company discontinued its "pharmaceutical" line. (3 D. Proofs, p. 58, X Q. 231.)

Searle & Hereth Company made and sold it till some time after the defendant was chartered (July, 1908), after which the defendant became the distributing company, but Searle & Hereth continued to manufacture all the Quin-Coco at its laboratories in St. 722c Louis. In March, 1909, Searle & Hereth Co. manufactured the first batch at Philadelphia. Thereafter, it was also made here. (Fritsch, foreman at Philadelphia laboratory. 3 D. Proofs, p. 458, Q. 4, 5.)

The testimony on both sides was put in as follows:

1. The plaintiff in its opening called Groves who testified that he had been a "helper" in the Searle & Hereth Philadelphia laboratory in 1908, and that he saw Fritsch experiment with Quin-Coco in the fall of 1908, and when Fritsch had made samples, he saw him compare them with a bottle of Coco-Quinine.

Fritsch (for defendant) denied all of this and testified that he did not, in the fall of 1908, experiment on Quin-Coco, but that in February, 1909, he received the formula from the St. Louis laboratory and then began to manufacture it. His "Record Cards" showed that the "first batch" was made in March, 1909.

Fritsch testified, also, that in 1907 or the spring of 1908 (before the defendant was chartered and bought out the old Warner Company), he had tried his hand at a sweet chocolate-quinine preparation, but had "dropped it." This had nothing to do with the defendant. (See infra.)

2. In the rebuttal, plaintiff called Garvin, defendant's St. Louis head laboratory man, in order to show that, in 1906, he had experimented with Quin-Coco. But Garvin merely stated that Mr. Merner (head of that office) gave him the formula and that then he began to make it, and that he did compare his product with a bottle of Coco-Quinine. There is no evidence that he then changed his product to a closer resemblance to Coco-Quinine.

722*d* *a*. There Were No Experiments at Philadelphia. The Formula Came from St. Louis Laboratory.

The plaintiff's opening proofs attempted to prove only what was done at the Philadelphia laboratory after July, 1908. That was the only proof defendant was required to meet.

Searle & Hereth Company had been manufacturing and selling Quin-Coco at St. Louis for two years before the defendant was chartered. The defendant shows by the evidence of Fritsch, the foreman of liquid preparations at the Philadelphia laboratory, that after the defendant was chartered, no experiments were made there; that William R. Warner and Company at first marketed Quin-Coco shipped to it by Searle & Hereth Company from St. Louis; that in February, 1909, he received from the St. Louis laboratory its Quin-Coco formula and that the "first batch" turned out in Philadelphia was in March, 1909. This Fritsch testified to from his "Record Cards."

It is not probable that the Philadelphia laboratory would experiment on a formula for a Quin-Coco preparation when its St. Louis laboratory had been working under its formula for two years? Uniformity of product between the two offices was essential.

Here is what Fritsch, the foreman, testified to (3 D. Proofs, 457) when called as a witness to meet the testimony of plaintiff's witness (Groves) presently to be referred to:

"Q. 15. We made no experiments with Coco-Quinine, and did not compare Coco-Quinine with any preparations I was making. Positively no experiments made."

"Q. 16. I made no experiments."

722*e* "Q. 18. I did not get my formulas from St. Louis until the early part of 1909. The month of March I made my first batch. I had no formula for Quin-Coco in 1908, and when it comes to a difference in color, there were no experiments made, therefore we could not compare any colors."

"Q. 20. When he made his first batch he 'compared it with Quin-Coco, S. & H. bottle, which I had before me.' (Meaning, of course, a S. & H. bottle of Quin-Coco received from St. Louis.")

"Q. 104. Did you ever compare your product with the Lilly product?

A. No, sir.

Q. 105. Never held one sample of your product along side of a sample of the Lilly product?

A. I have not got a bottle of the Lilly product in my department."

"R. X Q. 127. How did you regard it (Quin-Coco) in point of being practically the same thing (as Coco-Quinine)?

A. We did not compare it in regard to being the same thing at all."

Again, Fritsch testified that his first instructions to make Quin-Coco came from Mr. Garvin (who was in charge of the St. Louis laboratories) and who came to Philadelphia (3 D. Proofs p. 469):

"X Q. 86. From who did you receive your first instructions to make this product?

A. Mr. Garvin, of St. Louis."

"X Q. 89. Did Mr. Garvin visit you in Philadelphia?

A. Yes, sir.

X Q. 90. What did Mr. Garvin say to you about the product?

A. Simply, he gave me instructions, how he made the
722f product, how he put it together, how he compounded it.

X Q. 91. What did he say about Coco-Quinine?

A. I do not believe the word 'Coco-Quinine' was mentioned."

This appears to be a perfectly straight story and to be in accord with the probabilities.

Why should Searle & Hereth experiment in Philadelphia on a formula when they had been making the preparation in St. Louis?

What Fritsch Did in 1907 and Spring of 1908.

Before referring to the plaintiff's witness (Groves) called in the same connection, a word should be said about another "experiment" referred to by Fritsch. It was made in 1907 or early in 1908, when he was working for the old Warner Company, and months before the defendant was chartered and took over the business and assets of the old company. This old company consisted solely of Mr. William R. Warner.

As to this "experiment" Fritsch testified (3 D. Proofs, p. 466):

"X Q. 65. Were any of these experiments conducted during 1908?

A. In the early part of 1908 I experimented, and also in 1907.

X Q. 66. Were there no experiments made while Mr. Groves was in the laboratory with you?

A. Mr. Groves saw me make experiments in the early part of 1908 and 1907.

X Q. 68. Is it not possible that you might be mistaken, and that some of these experiments ran into the fall of 1908?

A. No, sir.

X Q. 69. As stated by Mr. Groves?

A. No, sir, positively."

722g A. to X Q. 74. "It simply was not a success, and I did not bother with it. Dropped it." When, in answer to R. X

Q. 134, page 474, Fritsch said that he "had had a sample (of Coco-Quinine) which I told you I was trying to imitate for William R. Warner & Company," he referred to the old Warner Company prior to July, 1908, and to the bottle of Coco-Quinine which he mentions in his answer to X Q. 64.

There is nothing to show the extent of this "experiment." It may have taken a day or a week. It may have been perfectly casual. There simply is no evidence of what it was. And it was certainly made on Fritsch's own initiative—and apparently without orders, for he testifies (X Q. 71) that the suggestion to him came from salesmen who "wanted to know if I could make a tasteless chocolate-quinine preparation." He does not appear to have told the president, Mr. Warner. And Fritsch's superior officer, McCambridge, who was in charge of the old Warner Company Laboratories at the time, testified (2 P. Proofs, p. 928, Q. 3), that no such "experiment" took place. That is merely to say that Fritsch never told him of it, and that Fritsch was not as a part of his regular duties trying to make a tasteless chocolate-quinine preparation. But do we not all know that chemists are forever trying "experiments"? That is all it amounted to. It does not affect the defendant, for it was before the defendant took over the old Warner concern.

As to the plaintiff's evidence. (1 P. Proofs, p. 555): Groves had been a "general helper" under Fritsch in the laboratory some seven years before and until December 31, 1908. He testified, in substance, that Fritsch had experimented in the end of 1908, and was unable to make a satisfactory product.

We cannot spare space to set forth what Groves testified to but when Fritsch was on the stand (3 D. Proofs, p. 458), all
722*h* the pertinent statements of Groves were read to Fritsch and he denied them all. The learned Court is asked to read Fritsch's testimony from Q. 10 to Q. 18.

So it becomes a question between Fritsch and Groves—not perhaps of veracity, but of memory. Whom shall we accept? Surely we have shown that the probabilities are with Fritsch. And surely Fritsch, who did the work, is more likely to remember what he did than Groves is to remember a casual knowledge of what some one else merely mentioned to him. And Fritsch was then a chemist (a trained man) while Groves at twenty-six years of age, was but a laboratory "helper."

And, too, when Groves testified, he was an employee of the Lilly Company, plaintiff, and that, in a witness of that type, does not strengthen his evidence.

Again as to what Fritsch did in 1907 and early 1908, in the old Warner Company, lest the Court might misunderstand its bearing. This is it. A chemist in a laboratory, of his own initiative and without orders, makes an experiment. What it amounted to we do not know. It does not appear that he said anything about it to his superior or to any officer of the company. It came to nothing. "It was dropped." Six months later the present parties bought out the assets of the old Warner Company. Shall we be told now that, six months before you took over that property, one of its chemists,

of his own initiation, tried to get up an imitation of Coco-Quinine and failed? Surely such evidence as that can not sustain a finding that "the plaintiff first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation."

There certainly is no evidence even from Groves that Fritsch "learned the ingredients" of the plaintiff's preparation. No
722i one has said that he did. On the contrary, Fritsch testified that he first made Quin-Coco from the St. Louis formula received in February, 1909. This is not denied, because all that Groves testified to was (Q. 21): "I do not recollect whether the working formula was received during my time in the laboratory or not." (He left the laboratory December 31, 1908.)

h. There Were No Experiments at St. Louis Before June, 1906, When the Pfeiffer Chemical Company First Made and Sold Quin-Coco.

We would not have thought of referring to anything so remote as this—something done by another corporation more than two years before the defendant was organized, if opposing counsel had not, in the end of his brief (Index, p. ii), coupled that transaction with what it contends defendant did in Philadelphia in 1908-1909, as proving that "the defendants directed their energies not to the preparation of formula for a legitimate competing preparation with Coco-Quinine, but to the counterfeiting of Coco-Quinine." This language was adopted, almost exactly in the opinion. The Court may therefore have considered the plaintiff's evidence of what took place in St. Louis in 1906. (It was put in in rebuttal and therefore was inadmissible, being clearly part of plaintiff's opening case if offered at all.)

What did take place, according to Garvin, at St. Louis? This is all that appears:

Garvin (2 P. Proofs 932) was called by the plaintiff in rebuttal, though his testimony could only be part of the plaintiff's case in chief. He testified:

"Q. 29. Where did you get the formula from which the preparation was made?

A. * * * the formula was supplied to me by Mr. Merner.

722j Q. 30. Where was it obtained by Mr. Merner and from whom?

A. I don't know.

Q. 25. Did you have a bottle of the Lilly preparation in the laboratory while you were conducting four experiments?

A. Later on; yes, sir.

Q. 27. What use did you make of it? I mean the Lilly preparation.

A. Looked at it so see if the physical appearance of the sample on which I was working was something like Lilly's."

That was all. Garvin received his formula from his chief; made his "sample" and "later on" compared it with a Coco-Quinine sample "to see if it was somewhat similar to Lilly's," which he had a right to do.

Is this fraud?

Is this act of a laboratory man, not made known to any superior official of his company, "clear evidence" to establish fraud.

The whole history of Quin-Coco appears from what we have just written to be this:

Merner, head of the St. Louis office, gave Garvin, his laboratory man, a formula and directed him to make this preparation, prior to June, 1906. No evidence as to where the formula came from.

Garvin made Quin-Coco.

He compared what he had made with a sample of Coco-Quinine.

Two years later (July, 1908) the Warner Company was chartered. Until March, 1909, it distributed Searle & Hereth Quin-Coco shipped to it from St. Louis. Then the Searle & Hereth Company at its Philadelphia laboratory got the formula from St. Louis and began to "make Quin-Coco at Philadelphia from that formula."

722*k* *c.* The learned opinion states:

"The only mark it [defendant's product] had was that of color which the defendant labored to make non-distinctive."

As we have just shown, the original formula was given by Merner to Garvin in 1906, was worked under in St. Louis till February, 1909, when it was sent to Philadephia and used there without change or experiment. It can hardly be said that we "labored to make our color non-distinctive."

But as we had a right to copy Coco-Quinine, was it fraud to approximate its color by comparing our color with its color? Coco-Quinine is not shown to have any precise shade of color, and it is shown below that we use cocoa just as it comes in barrel lots. There is no evidence that after it was compared, Garvin made any changes.

d. Again, the learned Court says:

"Its [defendant's] efforts were expended not so much in making a compound that would act like that of the plaintiff," &c.

Counsel are apprehensive, in view of this language, that they had not made the case clear to the Court. Let us try again. The sole medicinal agent in these preparations is the quinine. If one took two grains of quinine and placed them in a spoonful of chocolate, it would "act like" Coco-Quinine or Quin-Coco, medicinally and would have the same taste, *i. e.*, a chocolate taste.

But to use quinine and chocolate and to make a stable and "elegant pharmaceutical preparation" (as the druggists terms it) requires a formula and perhaps some pharmaceutical skill, a sort of cooking up or compounding with some other ingredients. But, to repeat, merely making a dose out of quinine and chocolate
722*l* will give the patient something which will "act like" Coco-Quinine. That requires no skill nor experimentation.

There is absolutely no evidence whatever that the defendant did procure samples of plaintiff's preparation and learn its ingredients." The medicinal ingredient, quinine, and the color and taste ingredient, chocolate, appear on the plaintiff's label and in the name Coco-Quinine. There is absolutely no evidence that we "learned" any other ingredient from the plaintiff's preparation. The evidence is that Mr. Merner, head of the St. Louis plant originally gave the formula to Garvin prior to June, 1906 (2 P. Proofs 937). Where Merner got it is not shown. There is no evidence that any one analyzed Coco-Quinine to learn its formula. It cannot be assumed that Merner obtained the plaintiff's formula wrongfully and from that build up a charge of fraud.

e. The opinion states:

"In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded."

1. If we have satisfied the Court that the formula originally came from Mr. Merner, at St. Louis, in 1906 (source from which he received it not being disclosed) and that it was worked under for two and a half years at St. Louis, and from March, 1909, at both St. Louis and Philadelphia, all without further change, it cannot be true that the defendant experimented as to the "precise color and taste" of the plaintiff's chocolate.

2. The variation in chocolate color is negligible. When mixed with another ingredient it controlls the color.

722*m* 3. The variation in chocolate taste is negligible. In fact, in both color and taste, chocolate, inany mixture, is dominant and controlling.

4. Though there be slight variations in color, the plaintiff does not raise any such question. The plaintiff does not raise a question of the "precise" color (shade) of our chocolate but of our use of chocolate at all.

4. The evidence is that the defendant's practice is to buy its chocolate by the barrel and use it as it comes. Thus Fritsch (3 D. Proofs, p. 462):

"Q. 24. It comes to me in barrels, about 300 pounds.
Q. 25. Just as it comes in the barrels, I use it."

"Q. 34. I made no effort to standardize the Cocoa in making Quin-Coco.
Q. 35. There are variations in color between different batches [of Quin-Coco]."

5. The writer does not remember a word of testimony in the case about imitating the taste of chocolate.

6. The opinion refers to "chocolates of different kinds. There is nothing in this Record to show that there are "chocolates of different kinds."

II. The learned opinion proceeds thus:

"It [the defendant] did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers."

722*n* 1. The bill avers (1 P. Proofs 7):

"That, afterwards, the said Searle & Hereth Company was bought * * * and renewed efforts were made to push said product labeled Quin-Coco in the drug trade and medical profession."

Also, p. 8:

"The said defendant corporation * * * has by many and diverse ways and schemes placed its said product on the market, representing * * * to the purchasing druggists and physicians."

2. The amended bill (1 P. Proofs, p. 638) avers:

"That renewed efforts were then made by defendant and by the Pfeiffer Chemical Company to push said product labeled Quin-Coco * * * in the drug trade and medical profession."

Also (on p. 639):

"That the said defendant corporation * * * has by many and divers ways and schemes placed its said product on the market, representing through its agents and salesmen to the purchasing druggists and physicians, &c."

3. The evidence is uncontradicted that the defendant very largely and as a part of its selling plan, did solicit physicians. Before referring to the evidence, we ask the Court to observe that there are two distinct classes of doctors: Prescribing doctors and "dispensing" doctors. G. A. Pfeiffer has testified as to the fact (3 D. Proofs, p. 15.

As to the total number of doctors and the number in each of these classes, Mr. Pfeiffer has given the only evidence in this case. Thus (p. 15, Q. 51):

"Q. 51. What are dispensing doctors and how general is the practice?

722*o* A. * * * The practice of dispensing medicines has grown very materialy in the last twenty-five years.

Q. 52. Among the doctors?

A. Very materially among the doctors in the last twenty-five years, and at the present time I should estimate that about one-half of the doctors could be classed as dispensing doctors.

Q. 53. Are some of them interested in drug stores?

A. Many doctors are interested in drug stores. Usually, when a

doctor becomes interested in a drug store, he ceases to be a dispenser and writes prescriptions for that drug store.

At page 30, Q. 128, Mr. Pfeiffer testifies:

"There are over 130,000 doctors. I have previously stated, that, in my opinion, 50 per cent. are dispensing doctors. That would mean over 65,000 dispensing doctors."

"Q. 127. Please state among what classes of customers your market lies?
A. Among dispensing doctors, retail druggists and jobbers."
"Q. 129. What proportion of your output is sold to dispensing doctors?
A. I am unable to state accurately, but in my opinion it is about one-sixth of our sales of pharmaceutical preparations."

(NOTE.—Quin-Coco is a "pharmaceutical.")

"Q. 56. About what per cent. of your sales are to retailers and dispensing doctors?
A. Seventy-five per cent.
Q. 57. How does Warner & Company sell their goods?
A. We employ a large force of travellers. At present we have between 75 and 80. These travellers reguarly call on the drug
722p trade and dispensing doctors. We also distribute literature to our customers and others through the mails and with the products."

"A. to Q. 65. Our policy is to solicit orders from retail druggists, from dispensing doctors and from jobbers."

"Q. 120. * * * I merely meant to ask whether the Lilly Company 'details' the prescription doctors.
A. They do.
Q. 121. And your company does not?
A. We do to a limited extent."

That is, the defendant solicits the "dispensing doctors (one-half of the whole) and some of the other half (the prescribing doctors). G. D. Merner was head of the St. Louis business from "sometime in 1908" (D. Proofs, top of p. 138). He testified that his salesmen "called on their customers" "from six times to one time a year." (3 D. Proofs, p. 139, Q. 16.)

"Q. 17. Upon whom do they call?
A. Retail druggists, hospitals, physicians, veterinarians and so forth."

"Q. 22. State among what class of customers you have found a market for your product, Quin-Coco?
A. Physicians and druggists.
Q. 23. How about jobbers?
A. By druggists I mean wholesale and retail."

Defendant's salesmen testified to calling on doctors. Thus: McNulty (3 D. Proofs, p. 103).

"X Q. 70. What other work is allotted to them [defendant's salesmen]?

722q A. Calling on physicians.

X Q. 71. What proportion of their time is devoted to such work?

A. It varies in various territories.

X Q. 72. Approximately, as an average?

A. I would say a quarter."

"X Q. 76. Do you refer to dispensing physicians or prescribing physicians?

A. I refer to both."

"X Q. 78. Is your house doing considerable detail work at this time?

A. More or less, yes."

(NOTE.—"Detail" work applies only to prescribing physicians).

S. J. Hagaman (3 D. Proofs, p. 134). He was an assistant sales manager.

"Q. 24. To what extent do they call upon physicians in their territory?

A. I would say about 25 per cent."

"Q. 26. Are they prescription doctors?

A. They are both prescription and dispensing physicians."

Henry J. Ritayik (3 D. Proofs, p. 169). Sales manager.

Q. 43-46. Quin-Coco is 'sold to all classes,' including dispensing and prescribing doctors."

James W. Wilkins (3 D. Proofs, p. 188.) Western Louisiana and East Texas territory, but no large cities.

"P. 190, Q. 20. I call on physicians, particularly dispensing physicians." "I call on them about every other trip, sometimes I will skip, and may be the third trip." "There are from 100 to 150 physicians in my territory."

722r B. F. Jones (3 D. Proofs, p. 205). South Mississippi, South Louisiana, Mobile and New Orleans, with 500 drug stores on which he calls four times a year.

"Q. 4. He calls upon about one-sixth of the dispensing doctors."

Howard H. Richards (3 D. Proofs, p. 227). Covered mostly the large cities in South Texas.

"He had but few dispensing doctors in his territory; mostly situated in the isolated districts." (It was city territory).

H. J. Gonzales (3 D. Proofs, p. 252). Covered parts of Louisiana, Mississippi and Arkansas, including cities of Natchez, Vicksburg and Jackson.

He called on druggists "four times a year." He called on about one-sixth of the doctors the same number of times a year.

P. 264. X Q. 94. "He visited only dispensing doctors."

C. G. McCarthy (3 D. Proofs, p. 268).

"Q. 10-12. He visited doctors from ninety days to six months. He visited 75 per cent. of dispensing doctors."

Ernest B. DeVall (3 D. Proofs, 293). Covered Tennessee territory with nearly 1,000 drug stores.

He called on each from six to three times a year.

He called on the doctors "to a limited extent only." He said, "There is some territory where I call on the doctors regularly every four months. If I have a drive that I can make to see the doctors whereby I can see as many as four in a day, I call on them regularly every four months. There are probably 100, may be 125, accounts in my territory of that kind."

X Q. 66. He calls only on dispensing doctors.

722s Eugene R. Brown (3 D. Proofs, p. 322). Covered Mississippi and Missouri territory with 1,000 drug stores, which he visits every three and one-half months.

"X Q. 6. I endeavor to see all the dispensing doctors in my territory every trip, that is the three times a year."

"R. D. Q. 56. What were your instructions as to detailing physicians?

A. If I was in town and had time to spare I would go around and see as many doctors as I could and detail them on our specialties, but if I would have to miss a train or lay over, or anything like that, I would just pass it up."

F. C. Stevenson (3 D. Proofs, p. 332). Not examined on this point.

H. E. Starring (3 D. Proofs, p. 359). Covered Detroit and surrounding counties.

"Q. 9. Called on druggists three times a year."

"X Q. 89. Called upon 'about forty or fifty dispensing doctors."

Charles S. Rogers (3 D. Proofs, p. 383). Covered parts of Michigan, outside of Detroit. Five hundred drug stores.

"Q. 7. He called on druggists from six to three times a year.

Q. 10. Visits dispensing doctors 'not to any great extent. Perhaps not more than three or four a week.' "

P. 392. X Q. 74. He had sold Quin-Coco only to dispensing doctors.

S. J. Nottingham (3 D. Proofs, p. 396). Covered central Georgia including the large cities and adjacent territory.

722t "Q. 54-57. I go to see dispensing doctors wherever I think they are good for what I sell them." Had sold Quin-Coco to dispensing doctors.

V. M. Moon (3 D. Proofs, p. 410). Covered Virginia territory including Richmond, Norfolk and other cities. Six hundred drug stores which he visits three or four times a year.

"Q. 9. I visit a good many dispensing doctors up there, the different sections of Virginia, southwest Virginia have a good many dispensers, some in Eastern Virginia, some in my home town.

It is not possible for travelling salesmen to visit anything like all the country doctors. We know that they have no office practice, but are constantly driving about during daylight hours.

III. The opinion states:

"It sent its salesmen directly to druggists, the retail dealers and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by the trade name and maker's name)."

We submit that the evidence does not sustain the above words in brackets ("referring to the latter by the trade name and maker's name").

The officers, sales managers and substantially all of the salesmen stated that that was bad salesmanship and that a skillful salesman pushes his own goods and does not mention his competitors' goods, and that that had been the practice.

The "Salesman's Confidential" so teaches (3 D. Proofs, p. 539). Every new salesman was instructed on that book.

722*u* G. A. Pfeiffer (3 D. Proofs, p. 35). The "Salesman's Confidential" teaches in Par. 17, "It don't pay to speak ill of or even mention your competitor."

H. Pfeiffer (p. 71). Taught new salesmen the same doctrine.

G. D. Merner (p. 143). "It is my aim to caution salesmen not to talk about their competitors."

H. J. Hagaman (p. 132). Sales manager, taught them not "to mention a competitor."

H. T. Ritayik (p. 172). Sales manager, taught new salesmen "not to mention the name of competitors in selling our products."

J. W. Wilkins (p. 195). Always had a copy of the "Salesman's Confidential" which taught the same doctrine.

B. F. Jones (p. 214, Q. 56): "I have always too much to do with my own line to mention a competitor."

H. H. Richards (p. 228, Q. 18): "Well as a rule, I make no reference to a competitor in selling an article."

H. J. Gonzales (p. 254, Q. 15) had carried out the instructions of the "Confidential" "right to the letter."

C. J. McCarthy (p. 270, Q. 16). The "Confidential" taught us "to avoid mentioning all competitors' goods." "I obeyed those instructions."

E. B. DeVall (p. 295, Q. 15, 16): "It is the policy of the house not to mention any competitor's goods at all." "I have obeyed it."

722*v* H. E. Starring (p. 362, Q. 26): "There is one rule, which we interpret from the instructions which Mr. Hagaman

us, that we should not mention our competitor's goods, but sell our own."

C. S. Rogers (p. 386, Q. 29 to 31): "The 'Confidential' teaches that it does not pay to speak ill of or even mention your competitors." "I understood these rules when I became employed." "I have acted upon them in my work."

S. J. Nottingham (p. 397, Q. 8 to 12): "I received my instructions as to my duties from Mr. H. Pfeiffer when I joined the house." "He has always said, never to mention a competitor."

V. M. Moon (p. 415, Q. 22): "My idea has always been to forget my competitors and try to sell my goods. I very seldom mention a competitor because it is very bad policy."

This includes all officers and sales managers and all of the salesmen except Brown.

IV. The opinion states:

"Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors."

There is but one witness who so testifies. In the charges at page 34 of appellant's brief no reference is made to such a practice, and in the "Index" at the end of that brief it is not referred to.

V. The opinion further states:

"For the consumer in this case the preparation was rebottled."

722*w* This would not be true as to Quin-Coco sold to dispensing doctors (who gave their patients what they thought best for them).

Nor to filling prescriptions in drug stores. With regard to sales over the counter, ther- is no evidence as to how many were by the dose or how many by the bottle.

VI. The opinion goes on to say:

"We have no doubt that the substitution of Quin-Coco for Coco-Quinine extensively practiced by druggists," &c.

"Extensively" is a relative word. There are 53,000 retail druggists. A few of these—half a dozen—were witnesses and admitted their dishonesty.

But defendant shows (Brief, p. 96) that trade morals among druggists are above the average; and when, in our emergencies, we deal with druggists we really do trust their honesty.*

The plaintiff's brief does not group them, or state the number of proven cases, but depends upon the false assumption that there is "no market" for anything but its Coco-Quinine, and therefore, it argues, all sales of Quin-Coco by druggists can be made only by "passing off."

The Court, we believe, will have a more enlightened opinion of

*Plaintiff's Brief, Index, p. iii, gives the names of only four dishonest druggists.

The officials of the defendant and nearly all of their salesmen who were impugned, testified to their belief in the dishonesty of "passing off" drugs.

druggists, and will not easily approve this aspersion of the retail drug trade by opposing counsel.

It is not true that there is no market for Quin-Coco. We have shown that there is (Brief, p. 118, 247). The plaintiff has
722*x* roamed the whole country and out of 53,000 druggists and 130,000 doctors has found thirty-four druggists who had never had a call for Quin-Coco, and fifteen doctors who had never prescribed it. Not very sufficient evidence to prove that there is "no market" for it. Defendant's brief, page 118, shows that Quin-Coco has a market.

VII. The opinion in early passages states as follows:

"That the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable."

"The next question of law, whether in counselling such fraud * * * the defendant also was guilty of fraud."

"Having counselled fraud upon the ultimate consumer."

"The purpose as well as the effect was to deceive the customer."

As to these findings we cannot here prolong an argument, but merely pray the Court to reconsider the following:

1. The improbability that the defendant, with millions at stake, should, as to one drug out of 5,000, and for a profit of $1,000 a year, adopt a dishonest and "ruinous" method of selling. "The strength of arguments must be in direct proportion to the improbabilities."

2. The care with which the defendant taught its salesmen the morals of selling.

3. The unqualified denial by every officer of the charges made.

We submit that these considerations negative fraud and require very clear evidence to overcome. Had the Court found that
722*y* enough of defendant's salesmen were "unfair" to charge the defendant with knowledge, we could have understood. But to begin with an independent finding that the defendant "counselled" fraud, we are unable to understand.

VIII. Again, reading from the opinion:

"We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses."

1. Only thirty-one druggists are urged even in the plaintiff's brief (see "Contents," p. i.) as impugning the salesmen and this out of 53,000 druggists; and out of some seventy-three druggists examined by plaintiff, the rest of whom had no charges to make. Substantially all of the thirty-one broke down in cross-examination.

2. Out of over 300 salesmen employed by defendant in these years, charges were made against only about ten, and many of these were single incidents in the selling work of salesmen who had visited from 400 to 1,000 drug stores three or four times a year, for years.

3. Every salesman (but one whose mind had failed) specifically denied the charges against him, and testified to entirely proper selling methods on his part.

In the light of this evidence we submit that fraud has not been "clearly" proved.

Defendant's Former Salesman Who Testified for Plaintiff.

We ask the Court to permit a few words as to these men. There are ten of them listed in the Table of Contents of plaintiff's brief, page *iv*.

722z Most of them were harmless.

Others became harmless under cross-examination.

Two of them were discharged men with an obvious bias.

If any of them, in chief, gave testimony derogatory to the defendant, they were testifying, in effect, that they themselves had been dishonest salesmen while in defendant's employ.

Such witnesses, we submit, are not favored in the law.

And seven of them were called in rebuttal, and one of them, O'Connell, in a second rebuttal. All of such evidence was objected to and ought to be rejected as contrary to the ordinary rules of practice.

The great mass of evidence (a large portion of it brought into the case to sustain the plaintiff's untenable contention that it had a monopoly of its preparation) has imposed on the Court a very onerous task. Counsel is willing to admit that in some way he may have failed to aid the Court. If he has, it was largely due to the fact that when the case was argued the plaintiff's brief had not been prepared and that the defendant's counsel did not know what the case was that he had to meet. A very large number of plaintiff's witnesses referred to below were not mentioned in the brief filed since the argument. If the defendant's counsel had received the opposing brief in due time, he could have focussed his brief and oral argument on the evidence relied upon by plaintiff.

Perhaps the proper penalty to have visited upon the plaintiff for not being ready would have been the dismissal of its appeal. As it is, the penalty has fallen upon the defendant.

We respectfully ask the Court to consider how very broadly its condemnation falls:

722aa On the officers, men of uprightness, who have built up this great business.

On the salesmen, of whom there are always seventy-five to eighty, and who, in these eight years, have numbered 300.

And (by the finding that "the substitution of Quin-Coco for Coco-Quinine is extensively practiced by druggists"), on the retail drug trade.

Does the evidence warrant it?

Further, we submit that the scope of the injunction directed by this Court to issue goes far beyond any decree in a similar case reported in the books. Even if the Court should fail to yield to the

considerations above set forth, we most earnestly protest against the imposition of such far-reaching restraint.

We submit that, for the above reasons, the defendant's counsel should be permitted to reargue this case after they shall have received a brief from the plaintiff and had time to prepare their brief in reply. The plaintiff's main contention (for a monopoly of its preparation) which permeates its entire brief, is now eliminated from this case. The reargument can be greatly narrowed.

JOSEPH W. HENDERSON,
ROGER S. BALDWIN,
FRANCIS RAWLE.
For Appellee.

GEORGE W. WICKERSHAM,
Counsel.

I hereby certify that the foregoing petition is not filed for the purpose of delay; and that, in my opinion, the grounds therein set forth are sufficient to justify a rehearing of the cause.

FRANCIS RAWLE.

723 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

Appellant's Reply to Appellee's Petition for Reargument.

E. W. Bradford,
Counsel for Appellant.

Washington, D. C.,
November 29, 1921.

723a In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

In Equity.

No. 2633.

ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

Appellant's Reply to Appellee's Petition for Reargument.

Counsel for plaintiff-appellant begs leave to submit a brief reply to appellee's petition for reargument. Such reply would have
723b been forwarded more promptly except that he has only today returned from a business trip that has kept him away from home since Thursday, the 24th instant.

Upon inquiry of the Clerk, it is understood that while the rules do not require replies to petitions for reargument, yet, when submitted, they will be considered by the Court. This reply is submitted chiefly for fear that failure to answer some of the statements in appellee's petition may be understood as acknowledging that they are supported by the "weight of evidence."

Replying to the statement on page 2 of said petition respecting the relationship of the several concerns associated with the Wm. R. Warner & Company: Attention is called to paragraph 8 of defendant's answer, page 3, Vol. III of the Record, and to the testimony of G. A. Pfeiffer X-Qs. 214-233, pp. 56-59, Vol. III, Record.

As to the testimony of Witness Groves for plaintiff and Witness Fritsch for defendant, referred to pp. 3-9 of petition:

In the first place, the record is full of testimony as to the identity of defendant's preparation with plaintiff's in physical appearance. This subject together with the testimony of Groves is reviewed beginning on p. 143 of appellant's principal brief.

The finding of this Court that defendants first procured samples of plaintiff's preparation and then proceeded to imitate it in appearance and in taste, is shown not only by Groves but by their own
723c chemist Garvin (Vol. II, p. 932) whose testimony is reviewed p. 147 of appellant's principal brief.

The duplication of the taste followed as a matter of course from the use of chocolate as a coloring and flavoring medium. The duplication in appearance was the result of careful comparison and experiment, with plaintiff's preparation as the standard.

That defendant succeeded in producing a preparation of deceptively similar appearance is shown not only by numerous witnesses for appellant but likewise by defendant's principal expert witness, Beringer. Mr. Beringer's testimony on this point is reviewed in appellant's principal brief under the heading "Beringer's

Blunder," p. 169. The testimony is found in Vol. III of the Record, pp. 528-529, X-Qs. 145-151.

As to the testimony of Fritsch claiming that his endeavors to reproduce Coco-Quinine, or make a substitute for it, in the laboratories of Wm. R. Warner & Company were prior to the time when it was acquired by the present owners, i. e., the owners of the Pfeiffer Chemical Company and the Searle & Hereth Company, there is absolutely no testimony in support of Fritsch, except his own, while all of the circumstances are against the truth of his statement and it is disputed by several very reliable and disinterested witnesses.

John E. McCambridge (Vol. II pp. 928-932) was the chemist in charge of the Warner laboratories from May, 1880, to August, 1908. He left a month or six weeks after the Pfeiffer Chemical Company took over the Warner business. Mr. Fritsch was a part of
723*d* Mr. McCambridge's laboratory force and was not in charge of any part of the laboratories.

Mr. McCambridge when asked (Vol. II p. 929, Q. 10) respecting Mr. Fritsch's testimony about the experiments on a chocolate quinine preparation under the old management replied:

"No such experiments were conducted."

Frank M. Ramsey (Vol. II, pp. 995-999) was connected with the Warner Company from 1871 to November 1908. In 1879 he began managing duties and for the last ten years of his employment was General Manager of the concern (Q. 2). Mr. Ramsey testified that Mr. Fritsch was an assistant to Mr. McCambridge (Q. 4).

This witness further testified that prior to severing his relations with Wm. R. Warner & Company in November, 1908, he had no knowledge of any experiments in the laboratories for the purpose of making a chocolate quinine preparation similar to Lilly's Coco-Quinine (Q. 7); that he never authorized or requested anyone to make any such experiments (Q. 8); and that the instructions to conduct any such experiments would have gone from himself or Mr. McCambridge (Q. 9).

John E. McCambridge (Vol. II, pp. 1059-1073) was recalled after Mr. Fritsch had been further examined and testified that all new preparations were first referred to him (Q. 6); that during all of his connection with the Warner laboratories he did not recall that they ever secured samples of the goods of other houses to imitate (Q. 7); that any order coming to the laboratory to reproduce a specialty of another house or to imitate it would have been an
723*e* unusual event (Q. 8) and not easily forgotten (Q. 9); and that at no time did the Warner concern under the old management consider manufacturing a substitute for any preparation of any other firm (Q. 11, p. 1063).

John E. McCambridge, Jr. (Vol. II, pp. 1073-1078) testified that he was employed in the Warner laboratories from June, 1901, to the middle of August, 1908, and after June 4, 1904, had charge of the analytical department in the laboratories (Q. 3); that he had no recollection of Mr. Fritsch's having conducted any experiments in an endeavor to make a duplicate of Coco-Quinine, Lilly, while he

witness) was connected with the Warner laboratories (Q. 6); and that he was so connected with the laboratories that had such experiments been made they would have been likely to have received his notice (Qs. 7-8); that the pharmaceutical department was a small department and the work was so concentrated that all would be likely to know what was going on and that experiments made from time to time were always compared by the employees who conferred with each other (Q. 9).

It is submitted that the testimony of these witnesses makes the testimony of Mr. Fritsch not only very unlikely but unbelievable and that the clear and convincing testimony of Mr. Groves is entitled to the credit given it in the opinion of the Court, particularly in view of all this testimony showing that Mr. Fritsch was clearly mistaken.

Replying to the argument beginning at the bottom of page 13, with quotations from plaintiff's bill found on page 14:

(23f) Plaintiff has never pretended that defendant has not made sales to those who are referred to frequently in the record as "dispensing doctors," a class of doctors that have been referred to by the Court as "druggist doctors." The bill does not charge that defendant solicited prescribing doctors but "purchasing druggists and physicians." Dispensing doctors are in the class of "purchasing druggists and physicians," that is, they buy their medicines and then dispense them.

Moreover, it is immaterial as to the averments of the bill for the proofs are abundant that defendant did not "detail" prescribing physicians to build up trade among the drug stores, or solicit said stores except by their methods complained of to induce the druggists to buy defendants' preparation to sell as a substitute for plaintiff's preparation.

The testimony of defendants' own salesmen is to the effect that it was not a part of the business nor in accordance with their instructions to detail their preparations to the prescribing physicians. (E. R. Brown Vol. III, p. 331—X-Qs. 53-55).

The record is so full of testimony which supports the statement quoted from the opinion of this honorable Court on page 20 of appellee's petition that comment is unnecessary.

The reference to defendants' "salesmen's Confidential" cannot be taken seriously. The evidence bearing upon this book, particularly the instructions in the back of the book to which counsel for appellee refers, was of a nature calculated to provoke a smile rather than serious consideration.

(23g) Replying to appellee's comments on the quotations from the opinion of the Court found on page 22 of the petition:

Witnesses testified not only to the salesmen comparing the color by pouring the respective preparations on white paper but also by pouring into glass graduates, such as are found in every drug store, and holding up for comparison, one preparation with the other. (Joseph A. Grimaldi, Vol. II, p. 977.)

The record is full of testimony by druggists and others that the representations of the defendants' salesman to the druggists were that neither the doctor nor anyone else could tell the difference between

defendant's preparation Quin-Coco and plaintiff's preparation Coco-Quinine (John W. Culver, Vol. II, p. 774).

Replying to appellee's comments on the quotation from the opinion of the Court found on page 23 of the petition:

Counsel for appellee again seems to complain because all of the 53,000 druggists in the United States were not called as witnesses. In other places he has complained because plaintiff called so many witnesses in so many different cities and sections of the country. Counsel is hard to please. It is submitted that sufficient testimony was taken and in sections so widely separated as to establish a practice, or a "habit," and that a sufficient number of druggists in each section were examined to show that the "habit" was exactly what this Court found it to be and to fully justify the conclusion that the substitution of Quin-Coco for Coco-Quinine is "extensively practiced" by druggists, as a result.

723*h* Replying to appellee's comments respecting the quotation from the opinion found on page 24 of its petition:

The suggestion made is entitled to no consideration. That defendants have made profits far in excess of one thousand dollars per year and far in excess of several times one thousand dollars a year in its infringement of plaintiff's goods is a matter that plaintiff expects to establish when it comes to an accounting. Defendant by the testimony of Harry E. James (Vol. III, p. 582) sought to show that its sales of Quin-Coco run from $13,000 to $15,000 per year. This is not believed to be an accurate statement of the volume of defendant's sales of this preparation for, as has been shown by numerous witnesses, it is found in the stocks of many drug stores in many sections of the country where it universally is sold as a substitute for plaintiff's Coco-Quinine.

Replying to counsel's comments on the quotation from the opinion of the Court found on page 25:

It is submitted that even if only 31 druggists testifying in perhaps as many different cities and towns throughout the country show the practice to be as found by the Court, this in itself is sufficient to "fully establish" such practice.

Counsel, on page 26, complains because the brief on behalf of appellant was not on file at the time of the argument. The

723*i* Court will recall that counsel for appellant had not been able to complete his brief and have it printed before the argument but the argument was ordered to proceed and a printer's proof copy of the brief was used. Counsel for appellant was given ten days within which to complete and file his brief, and counsel for appellee was then allowed thirty days within which to file a brief in reply should he desire to do so. This privilege he exercised and presumably covered all matters which he had not been able to reply to because of any failure by counsel for appellant to have his brief ready in time.

In this connection, it is submitted that as a reason for re-argument such statement is without force because the brief for appellant before this Court is substantially the same as used in the District Court, only reprinted and to some extent re-arranged to bring the

subject matter and the argument into what was thought to be better form. The subject-matter is the same as that of the brief for plaintiff in the Court below, copies of which counsel has had since May, 1920.

Defendant has had the advantage of the services of eminent counsel of national reputation from the inception of this proceeding. Its case was prepared with great elaboration and care. No questions with which counsel for appellee were unfamiliar and had discussed before the District Court were raised in this Court.

Counsel for appellant was in Philadelphia on the morning of November 25, 1921, and on inquiry at the Clerk's office, found that the expected petition for re-argument had not been filed by appellee but that it was likely to be filed during the day.

723*j* Counsel for appellant then filed a brief memorandum calling the attention of the Court to the manner in which the defendant is utilizing the time, while the sending down of its mandate is delayed by these proceedings, in pushing the sales of its preparation in infringement of appellant's rights.

In order that the same may appear in printed form, it is printed as the last page hereof.

It is submitted that no good reason has been advanced for a re-argument.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Appellant.

Washington, D. C.,
November 29, 1921.

723*k* In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1921.

No. 2633.

ELI LILLY & COMPANY, Appellant,

vs.

WM. R. WARNER & COMPANY, Appellee.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Counsel for Appellant upon inquiry of the Counsel for Appellee ascertains that it is Appellee's purpose to file a petition for re-argument during this day, it being the last day allowed for such petition under the extension of time granted by the Court.

Without presuming to advise the Court on any question raised by such petition, Counsel for Appellant begs leave on behalf of his client, to state to the Court that reports are coming to Plaintiff from its traveling representatives that defendant's salesmen are now and have been since the decision of this Court in this case using unusual effort to place defendant's infringing preparation in the drug stores

of the country and are making statements to the druggists to the effect that this case has not been finally decided, that an appeal to the Supreme Court has been taken, and that they still have the right to make such sales.

Ample and competent proof in support of this statement can be furnished if desired.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Appellant.

Philadelphia, Penna.,
November 25, 1921.

(Copy furnished Counsel for Appellee.)

724 *Petition for Rehearing.*

This action, vigorously contested, resulted in an immense record. The testimony was directed to various aspects of the case arising from the rather technical law of trademarks and the much broader law of unfair competition. In analyzing the testimony and distinguishing the law we have been greatly aided by counsel for both parties. Their industry in collecting the evidence and their thoroughness in discussing the law were of such high order and so equally balanced that our labors have been lightened. That our decision finally turned on an aspect of the case which caused others to pass out of view was due to no fault or omission of counsel for the respondent but to the controlling importance which the court gave the testimony in this regard. By the respondent's petition for a rehearing, we have not been shown that we have mistaken this testimony or misinterpreted its imputations, nor have we been persuaded that we have erred in our deductions. We believe that a rehearing would produce nothing more than a repetition of the able argument already made. We are constrained, therefore, to deny the petition for rehearing.

Per CURIAM.

Endorsements: 2633. Order Denying Petition for Rehearing. Received & Filed Jan. 16, 1922. Saunders Lewis, Jr., Clerk.

725 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennyslvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between The Eli Lilly & Company (plaintiff below) Appellant, and William R. Warner & Company (defendant below) Appellee, a decree was entered in the said District Court on the eighteenth day of October, 1920, which decree is as follows:

"And now * * * this cause having come on for a hearing on bill as amended and answer as amended and proofs and having been argued by Ernest W. Bradford, Esq., for plaintiff, and Francis Rawle, Esq., and Roger S. Baldwin, Esq., for defendant, thereupon upon consideration thereof,

It is Ordered, adjudged and decreed, that the bill be dismissed with costs to the defendant."

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

726 And Whereas, in the term of March, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with the direction that an injunction issue in accordance with the opinion of this Court; and that the said Appellant, Eli Lilly & Co., recover against the said Appellee, William R. Warner & Co., in the sum of two hundred and sixty-two dollars and twenty-five cents ($262.25) for its costs herein expended, and have execution therefor.

Philadelphia, September 30, 1921.

726½ You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixteenth day of January, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

Costs of the Eli Lilly & Co.

Clerk	$55.25
Printing Record	187.00
Attorney	20.00
	$262.25

[Endorsed:] Original File No. 2633. U. S. Circuit Court of Appeals, Third Circuit, March Term, 1921. No. 19. Eli Lilly & Co., Appellant, vs. Wm. R. Warner & Co., Appellee. Copy of Mandate. Received & Filed Jan. 16, 1922. Saunders Lewis, Jr., Clerk.

727 Duplicate.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Eli Lilly and Company is appellant, and William R. Warner & Company is appellee, No. 2633, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

728 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

729 [Endorsed:] 2633. File No. 28,812. Supreme Court of the United States, October Term, 1921. No. 857. William R. Warner & Company, vs. Eli Lilly & Company. Duplicate Writ of Certiorari.

730 In the United States Circuit Court of Appeals for the Third Circuit.

No. 2633.

WILLIAM R. WARNER & COMPANY, Appellee,

vs.

THE ELI LILLY COMPANY, Appellant.

Counsel for the respective parties hereby Stipulate that the Record now before the Court on the above Petition shall be taken to constitute the Return to the Writ of Certiorari.

FRANCIS RAWLE,
For Petitioner.
E. W. BRADFORD,
For Respondent.

May 25th, 1922.

Endorsed: 2633. Stipulation of Counsel for Return to Writ of Certiorari. Received & Filed May 31, 1922. Saunders Lewis, Jr., Clerk.

731 & 732 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Stipulation of Counsel for Return to Writ of Certiorari in the case of William R. Warner & Company, Appellee, vs. The Eli Lilly Company, Appellant, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Twentieth day of July in the year of our Lord one thousand nine hundred and Twenty-two and of the Independence of the United States the one hundred and Forty-seventh.

[Seal of United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

733 [Endorsed:] File No. 28812. Supreme Court U. S., October Term, 1922. Term No. 322. Wm. A. Warner & Co., Petr., vs. Eli Lilly & Co. Duplicate Writ of Certiorari & Return. Filed July 21, 1922.

734 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of: The Eli Lilly & Co., Appellant, vs. Wm. R. Warner & Co., Appellee, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this first day of April in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

[Seal of United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Supreme Court of the United States.

Supreme Court, October Term, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, Petitioner,
vs.
ELI LILLY & COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Counsel for the respective parties hereby stipulate subject to the approval of the Court, that the annexed copy of the Bill of Complaint shall be taken to be a true and faithful copy from the original record in the Circuit Court of Appeals, Third Judicial Circuit, in the above entitled case with the same effect as if it had been duly certified in obedience to the above mentioned writ of certiorari.

February 13, 1923.

FRANCIS RAWLE,
For Petitioner.
E. U. BRADFORD,
For Respondent.

Washington, D. C., Feby. 19/23.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity. No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,
vs.
WM. R. WARNER & COMPANY, a Corporation.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The Eli Lilly and Company, a corporation, organized and existing under the laws of the State of Indiana, and a citizen of said State, and located and doing business in the City of Indianapolis, County of Marian and State of Indiana, and having its principal place of business in said City, brings this its bill of complaint against the Wm. R. Warner & Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State, and located and doing business in the City of Philadelphia, County of Philadelphia and State of Pennsylvania;

And thereupon your orator complains and says:

1. That it is a corporation organized under the laws of the State of Indiana and located at Indianapolis in said State; that it has been for many years and is now engaged in the preparation, manufacture, sale and distribution of pharmaceutical and other chemical

products and that it has manufactured and sold many such products of high therapeutical value; that by reason of the care and skill exercised in the preparation thereof and in the selection of the ingredients therefor, its products have been found of exceptional quality and value in use and are regarded as standard in the medical profession and drug trade; that its products enjoy the confidence of physicians, nurses and pharmacists and its name and reputation have come to be regarded as a guarantee of the quality and character of any products associated therewith; that among others of such products that it has manufactured and placed upon the market is one which it named "Coco-Quinine," the same being a Quinine compound of high medicinal value in the treatment of malaria and kindred diseases.

2. That it began the manufacture and sale of said product, so known as Coco-Quinine, in the year 1899; that at the time it commenced the manufacture and sale of said product no similar product was known either to the drug trade or to the medical profession, and that the name so selected to designate said product had not theretofore been in use to designate any product of a like class, and that the product and the name were each and both new to the drug trade and to the medical profession; that said product was the result of long study and expensive experiment required to overcome various difficulties encountered in its production in a commercial, palatable, and fixed medicinal form; that on introducing the product to the drug trade and medical profession it was received with favor and the sales grew and became profitable and in time became an important part of your orator's business; that it maintains at great expense an extensive selling organization through which it introduces its products not only to the drug trade but to the physicians of the country, acquainting them with the therapeutical values of said products; that by its introduction of said product Coco-Quinine, to the druggists and physicians through said organization and, in turn, to the public by said druggists and physicians, it became widely and favorably known as a remedy for the physical ills for which it is indicated; that its sales grew from year to year until it became not only well and widely known by the name Coco-Quinine, which your orator had adopted as its designating name, but also became known and recognized as one of your orator's products, and that your orator's name and reputation as a manufacturer of medicinal preparations did and does stand as a guarantee of its quality and character.

3. That as a further means of identifying the origin of said product your orator made it of a special color, substantially that commonly called "chocolate" color, as will appear by samples of said product to be properly identified and produced in evidence herein, which color is wholly non-essential to the medicinal or other vital characteristics of said product.

4. That as a further means of identifying the origin of said product, and enabling it to be identified by taste as well as by observation it adopted a certain arbitrarily selected flavor, secured by combining with the Quinine compound a prepared chocolated syrup, which gives said product a chocolate flavor; that notwithstanding

said syrup serves to make said product palatable, there are many other syrups of other flavors that might be used for the same purpose, and said chocolate flavor is wholly non-essential to the medicinal or other vital characteristics of said product.

5. That from the beginning of the manufacture and sale of said product in the year 1899 to the present time, it has been known and recognized by said name Coco-Quinine, and also by its color, and is also recognized by users by its flavor or tastes as well as by its medicinal effects, and that its wide sale and extensive use, resulting from the continuous development of the business from then until now, have resulted in said product becoming known as a standard remedy for certain physical ills, and so identified as the product of your orator, that it has been so known since shortly following its introduction to the public by your orator, as aforesaid, and that until the acts by defendant and its predecessors and associates, herein complained of, your orator's exclusive rights as originator and proprietor of said product, its name and designating color and flavor, were recognized, acknowledged and freely acquiesced in by the trade and are so acknowledged today by the majority of its reputable competitors and by the great majority of druggists and physicians.

6. That your orator has sold and continues to sell said product not only in bottles of various sizes adapted to be sold by the drug trade in the original packages, but also in bulk in large containers, adapted to be retailed by the drug trade in their own containers and under their own form of label identifying the product as Coco-Quinine; that your orator's bottles and containers have been marked and identified by special labels prepared by your orator, samples of which will be duly identified and offered in evidence herein, on which the name Coco-Quinine has appeared in connection with its own corporate name; that said name Coco-Quinine has thus been associated with its business and its name in the drug trade and medical profession for more than fifteen years, until now and since said beginning the mention of the name "Coco-Quinine" immediately suggests to the drug trade or the physician, your orator's product, and that such name means to them your orator's product and none other.

7. That your orator has diligently, by all legitimate methods and means, sought to increase the sale of its said product wherever any demand therefor existed; that it has from the beginning manufactured said product in quantities to fill all orders coming to it therefor, always maintaining its high standard for medicinal properties, and that its efforts, its care and skill in manufacture, its large expenditures of money and labor in distribution, and its own reputation as a manufacturer of medicinal products of high therapeutical value, have created for said product not only a large demand but established for it a high reputation as a remedy for the physical ills for which it is indicated.

8. That the defendant, the Wm. R. Warner & Company, is a corporation organized under the laws of the State of Pennsylvania, a citizen of said State, and is located and has its principal place of

business in the City of Philadelphia, in said State, and is engaged in the preparation, manufacture and sale of medicinal products, and is also the selling agent or distributor of the products of various other concerns and corporations, owned and controlled by the same parties or stockholders as the said defendant corporation; that among the said concerns for which the said defendant corporation acts as distributor is the Searle & Hereth Company, a corporation of Illinois, formerly located at Chicago, Illinois, but now having its principal office and place of business with the Pfeiffer Chemical Company, at 500 North Commercial Street, in the City of St. Louis, State of Missouri; that the said Pfeiffer Chemical Company is another of the concerns or corporations for which said defendant corporation, the Wm. R. Warner & Company acts as selling agent or distributor of its product, and that said several corporations are all owned, officered and managed by substantially the same parties; that some time about the year 1907 or 1908, the said Searle & Hereth Company, a corporation now thus associated with said defendant corporation, well knowing the facts hereinbefore recited in reference to your orator's product Coco-Quinine, with wrongful and fraudulent intent to divert and appropriate to its own use and profit a part of your orator's business in the sale of Coco-Quinine, began the manufacture of a product of the same color and appearance and similar flavor and intended for the same purposes as your orator's said product; the said Searle & Hereth Company made its said product in exact imitation of your orator's product with the purpose and intent of selling it as a substitute therefor and enabling druggists and others to substitute it for your orator's product when Coco-Quinine was called for by customers and indicated on physicians' prescriptions; that said Searle & Hereth Company adopted the name "Quin-Coco" as a name for its said product and so labeled the same; that the said name and label are such close imitations of the name and label by which your orator's product has become widely known that they are easily confused therewith; that said product of said Searle & Hereth Company both by flavor, appearance and name was and is so identified as a substantially exact imitation of and substitute for your orator's product, and so recognized in the trade; that said Searle & Hereth Company offered its said product to your orator's customers, druggists and dealers, informing them that it could and can be sold, and used, as a substitute for your orator's product; that it was sold to the trade on such representations, and was sold by druggists, following such instructions, to supply demands from customers for your orator's product; but for a time the efforts of said Searle & Hereth Company to market its said product met with indifferent success and did not materially interfere with the business of the sale of your orator's product.

9. That afterwards, the said Searle & Hereth Company was bought by the same parties or interests now owning the Wm. R. Warner & Company, the defendant herein, and renewed efforts were made to push said product labeled Quin-Coco in the drug trade and medical profession as a substitute for your orator's product known as Coco-Quinine; that the exact date of this transaction is not known to

your orator but it is informed and believes that it was about the year 1908 or 1909; that your orator is informed, and alleges the fact to be, that the said corporation Searle & Hereth Company is no longer an active manufacturing concern but that its corporate existence is being kept alive although its business is practically merged into and combined with the business of the Pfeiffer Chemical Company of St. Louis, Missouri; that while the said product called "Quin-Coco" is put out under the original Searle & Hereth label, that it is actually manufactured in the laboratories of the said Pfeiffer Chemical Company in St. Louis, the original label being used by said Pfeiffer Chemical Company for purposes best known to itself; that said Pfeiffer Chemical Company and the said defendant corporation, Wm. R. Warner & Company, although separate corporations, are composed of the same stockholders and managed by the same officers and that the said defendant corporation in pushing the sale and distribution of said product called "Quin-Coco" is for all practical purposes the manufacturer as well as the distributor; that the said defendant corporation, since the establishment of the relations with the said Pfeiffer Chemical Company and the Searle & Hereth Company, as aforesaid, has by many and divers ways and schemes placed its said product on the market, representing through its agents and salesmen to the purchasing druggists and physicians that said product can be furnished in lieu of and for your orator's product Coco-Quinine when it is called for by customers, or by physicians' prescriptions; that following such instructions druggists have sold and are now selling said product called "Quin-Coco" as and for your orator's product "Coco-Quinine" and when your orator's said product is called for; that customers frequently receive said imitation product from druggists labeled with the druggist's own label but bearing the name "Coco-Quinine," the name of your orator's original product; that such methods have resulted in depriving and are now depriving your orator of large sales of its product and the consequent profit thereon, and have resulted and are resulting, further, in the deception and defrauding of the purchasers and users who in asking for Coco-Quinine, intended to purchase and expected to receive your orator's product, which they had been accustomed to use and which product had acquired an established reputation with them for its quality and medicinal characteristics; and that by said methods the said defendant corporation has, through its agents, salesmen and confederates, pushed the sale and distribution to the trade of the said product called "Quin-Coco," but largely retailed as Coco-Quinine.

10. That the product so sold by said defendant is inferior in quality and in medicinal properties to Coco-Quinine and its use as a substitute for Coco-Quinine has not only deprived your orator of profits to which it is justly entitled, on the sale of goods for which it has created a demand, but has injured the reputation of your orator's product in many localities, and for these reasons, interfered seriously with the demand therefor and also resulted in defrauding the public by giving it a different product from that demanded, and one of less merit.

11. That by reason of the long and continuous use of the name "Coco-Quinine" to designate your orator's product, said name has come to have a secondary significance as a trade mark, and for a long time, or since its adoption in 1899, has been recognized in the trade and by physicians and users as your orator's exclusive trade name for said product; that by reason of the long and continuous use of the particular color of your orator's product, said color has also come to be recognized in the trade and by physicians and users as identifying the origin of said product as that of your orator; that by reason of the long and continuous use of said product of the certain chocolate flavor, said flavor has come to identify the origin of your orator's product; your orator therefore charges that said defendant is guilty of willful infringement of your orator's rights to said trade name, and also that it is guilty of willful infringement of your orator's trade right to said arbitrary distinguishing and identifying color for said product and also that it is guilty of willful infringement of your orator's trade right to said arbitrary distinguishing and identifying flavor, and that the name "Quin-Coco" and the closely imitated color and flavor of defendant's said product, each was adopted and used, and is used, with the fraudulent and wrongful purpose and intent of unfairly and fraudulently diverting to said defendant part of your orator's trade and to enable its product to be palmed off upon the public as and for the product of your orator, and your orator is informed, believes and so charges that the defendant, through its salesmen, agents, druggists, dealers and confederates, when Coco-Quinine has been asked for, has artfully and fraudulently substituted, and is now substituting, for and in the place of your orator's product, desired and expected by the customers, the said substitute product for identification called "Quin-Coco," all to the manifest injury of your orator, the deception of the public, and contrary to equity and fair dealing.

12. Your orator further says that its exclusive right to the use of said name Coco-Quinine, and in the premises, are of very great value in its business, to wit, in excess of five thousand dollars; and, further, that its exclusive right to the use of said arbitrary designating color and also to said flavor, for its said product Coco-Quinine, are each of great value, to wit, in excess of five thousand dollars each, and the defendant's acts and doings hereinbefore complained of in the infringement of your orator's rights, and in diverting business and profits from your orator, have caused and are now causing your orator great and irreparable pecuniary loss and injury, the exact amount of which it cannot, with certainty state, but the said loss and injury to your orator as it verily believes, amounts to more than ten thousand dollars, exclusive of interest and costs, and so charges the fact to be, and your orator verily believes that if the said acts of the defendant are continued, that such loss and injury will amount to many more thousands of dollars, and result in great damage to your orator's trade in said Coco-Quinine, and to the value of its trade name, and other distinguishing and identifying characteristics, and to your orator's own reputation as a manufacturer of medicinal products of standard therapeutical value.

13. Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed and may make a full disclosure and discovery of all the matters aforesaid, your orator prays that the defendant may be required according to the best and utmost of its knowledge, information and belief, to make full, true and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived; and your orator further prays that the defendant be ordered and decreed to account for and pay over to your orator the income and profits thus unlawfully derived in violation of your orator's rights in and to said trade name, and in and to said designating color, and said flavor, and, in addition, that your Honors assess or cause to be assessed against the defendant the damages sustained by your orator; and also that the profits accrued to the defendant, and the damages resulting to your orator, resulting from the unfair competition in trade, aforesaid, may be assessed and decreed to be paid over to your orator, and that upon the rendering of a decree herein, your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the willful and unfair infringement by the defendants as herein set forth.

14. And your orator further prays, to the end that the defendant be restrained from further violation of your orator's rights aforesaid, that your Honors may grant a writ of injunction issued out of and under the seal of this Honorable Court, perpetually enjoining and restraining the said defendant, its associates, and its and their agents, clerks, attorneys, and employees, from any use in any manner of said name "Coco-Quinine," or the reverse form thereof, "Quin-Coco," or any similar confusing modification of said name, Coco-Quinine, as a trade-mark for such product, or for goods of substantially the same descriptive properties, and from the use of the chocolate color as a distinguishing mark for such product, or for goods of substantially the same descriptive properties, and from the use of said flavor as a distinguishing mark for said products or for goods of the same descriptive properties, and from any colorable imitation of said marks, or designating characteristics, or from any use of either in such manner as to be calculated to deceive the public into buying the goods sold by the defendant for the goods of your orator, and from selling any product of substantially the same descriptive properties as your orator's compounded, flavored and colored to resemble your orator's, or in any such near resemblance thereto as might be calculated to deceive, and from offering said product identified herein as Quin-Coco, or any similar product, as a substitute for your orator's product Coco-Quinine, and from informing or instructing those in the trade, or physicians, that such product can be substituted, sold and used for your orator's said product, or in any manner inducing, persuading or suggesting to retailers, or others, that they offer or sell or use such or any other substitutes, for your orator's product.

15. And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendant from any further infringement of said trade rights and any further unfair competition, in manner and form as prayed for in respect to said perpetual injunction.

16. And your orator prays that the defendant may be ordered and decreed to deliver up to your orator to be destroyed, all labels signs, prints, bottles, packages, wrappers or receptacles in the possession of the defendants, bearing the said trade name Quin-Coco, or any other colorable imitation of your orator's trade name, Coco-Quinine, or any reproduction, copy or counterfeit thereof, and likewise that the defendant be ordered to deliver up to be destroyed, all of said product "Quin-Coco" in its possession, and that your orator may be awarded the costs of this suit and such other and further relief as the equity of the case may require and to your Honors may seem meet.

17. May it please your Honors to grant unto your orator, not only the writs of injunction conformable to the prayers of this bill, but also writs of subpœna ad respondendum of the United States of America, directed to the said defendant corporation, Wm. R. Warner & Company, commanding it on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree in the premises as to the Court shall deem proper and required by the principles of equity and good conscience.

THE ELI LILLY AND COMPANY,
By JOSIAH K. LILLY, *President.*

J. ADDISON ABRAMS,
Solicitor for Complainant.
BRADFORD & DOOLITTLE,
Of Counsel for Complainant.

UNITED STATES OF AMERICA,
State of Indiana, County of Marion, ss:

On the 10th day of December, 1914, before me personally appeared Josiah K. Lilly to me personally known, who, being by me duly sworn, deposes and says that he is the President of The Eli Lilly and Company, the complainant corporation named in the foregoing Bill of Complaint, and that he is familiar with its business, that he has read the foregoing Bill of Complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

[SEAL.] A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

[Endorsed:] File No. 28,812. Supreme Court U. S., October Term, 1922. Term No. 322. William R. Warner & Co., Petitioners vs. Eli Lilly & Co. Stipulation and addition to record. Filed Feb 20, 1923.